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Nos. 02-1703 and 03-101

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In The
Supreme Court of the United States

UTAH SHARED ACCESS ALLIANCE, *et al.*,

Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,

Respondents.

GAIL NORTON, Secretary of the Interior, *et al.*,

Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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94 pp

QUESTIONS PRESENTED

1. Whether this Court should accept review of this case at an interlocutory stage when the Bureau of Land Management (BLM) has not been ordered to take any action, and when further proceedings may moot or narrow petitioners' concerns.

2. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to consider a claim that BLM failed to satisfy its mandatory duty to prevent the impairment of four specific wilderness study areas.

3. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to consider a claim that BLM had failed to comply with its mandatory duty to "manage the public lands . . . in accordance with . . . land use plans," when it was undisputed that the agency had not taken the two land use plan actions at issue.

4. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to decide whether BLM violated the National Environmental Policy Act by failing to consider significant increases in off-road vehicle use on specified BLM lands in Utah.

PARTIES TO THE PROCEEDINGS

The following are parties to this proceeding:

1. Petitioners:

Gale Norton, Secretary of the Interior
Kathleen Clarke, Director of the Bureau of Land Management
Bureau of Land Management
Utah Shared Access Alliance
The Blue Ribbon Coalition, Inc.
Elite Motorcycle Tours
Anthony Chatterly

2. Respondents:

Southern Utah Wilderness Alliance
The Wilderness Society
Sierra Club
Great Old Broads for Wilderness
Wildlands CPR
Utah Council of Trout Unlimited
American Lands Alliance
Friends of the Abajos
State of Utah
San Juan County, Utah
Emery County, Utah
Wayne County, Utah
Kane County, Utah
Utah School and Institutional Trust Lands Administration

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Southern Utah Wilderness Alliance, The Wilderness Society, Sierra Club, Great Old Broads for Wilderness, Wildlands CPR, Utah Council of Trout Unlimited, American Lands Alliance, and Friends of the Abajos have no parent companies and issue no corporate stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. STATUTORY BACKGROUND 3

1. FLPMA'S NONIMPAIRMENT REQUIREMENT 3

2. FLPMA LAND USE PLANNING AND THE ACCOMPANYING ENVIRONMENTAL REVIEW PROCESS 4

B. THE PROCEEDINGS BELOW 5

REASONS FOR DENYING THE PETITION 10

I. THE PROCEDURAL POSTURE OF THIS CASE RENDERS IT AN INAPPROPRIATE CANDIDATE FOR SUPREME COURT REVIEW 10

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY COURT OF APPEALS 13

III. THE ISSUES THAT BLM RAISES IN ITS PETITION REVIEW ARE NOT PRESENTED IN THIS CASE. 17

IV. THE TENTH CIRCUIT'S DECISION TO ALLOW SUWA'S UNEXCEPTIONAL APA CLAIMS TO PROCEED IS CONSISTENT WITH THE TREATMENT OF SUCH CLAIMS BY OTHER COURTS..... 21

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Adams v. Richardson,
480 F.2d 1159 (D.C. Cir. 1973) 23

American Construction Co. v. Jacksonville, Tampa & Key West Railway Co.,
148 U.S. 372 (1893) 11

Bennett v. Spear, 520 U.S. 154 (1997) 21

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327(1967) 10

Center for Biological Diversity v. Veneman,
335 F.3d 849 (9th Cir. 2003) 16, 23

Darst-Webbe Tenant Ass'n Board v. St. Louis Housing Authority, 339 F.3d 702 (8th Cir. 2003) 23

Davis Associates, Inc. v. Secretary, Department of Housing & Urban Development,
498 F.2d 385 (1st Cir. 1974) 25

Ecology Center Inc. v. United States Forest Service,
192 F.3d 922 (9th Cir. 1999) 16

Edgerton v. Kingsland,
168 F.2d 128 (D.C. Cir. 1947) 25

Flynn v. Schultz, 748 F.2d 1186 (7th Cir. 1984) 25

Forest Guardians v. Babbitt,
174 F.3d 1178 (10th Cir. 1999) 23

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.,
240 U.S. 251 (1916) 10

Huck v. BLM, IBLA No. 2003-169 19

Hughes River Watershed Conservancy v. Glickman,
81 F.3d 437 (4th Cir. 1996) 5, 20

Idaho Watersheds Project v. Hahn,
307 F.3d 815 (9th Cir. 2002) 25

Iowa ex rel. Miller v. Block,
771 F.2d 347 (8th Cir. 1985) 23

Lujan v. National Wildlife Federation,
497 U.S. 871 (1990) 13, 14, 15, 16

Marquez-Ramos v. Reno,
69 F.3d 477 (10th Cir. 1995) 25

Marsh v. Oregon Natural Resources Council,
490 U.S. 360 (1989) 5, 20

Mausolf v. Babbitt, 125 F.3d 661 (8th Cir. 1997) 18

Montana Wilderness Ass'n v. United States Forest Service, 314 F.3d 1146 (9th Cir. 2003) 16, 23, 24

NAACP v. Secretary of Housing and Urban Development, 817 F.2d 149 (1st Cir. 1987) 22

Nike, Inc. v. Kasky, 123 S. Ct. 2554 (2003) 12

Norton v. BLM, IBLA No. 2003-171 19

Ohio Forestry Ass'n v. Sierra Club,
523 U.S. 726 (1998) 16, 18, 19

Public Citizen Health Research Group v. Commissioner, Food & Drug Administration,
740 F.2d 21 (D.C. Cir. 1984) 23

Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988) 4

Sierra Club v. Peterson,
228 F.3d 559 (5th Cir. 2000) 15, 16

Southeastern Utah OHV Club v. BLM,
IBLA No. 2003-172 19

South Trenton Residents Against 29 v. Federal Highway Admin., 176 F.3d 658 20

Telepak v. BLM, IBLA No. 2003-170 19

Village of Grand View v. Skinner,
947 F.2d 651, 657 (2d Cir. 1991) 20

Virginia Military Institute v. United States,
508 U.S. 946 (1993) 10

Wilbur v. United States ex rel. Kadrie,
281 U.S. 206 (1930) 25

STATUTES, REGULATIONS, AND RULES

5 U.S.C. § 551(13) 22
5 U.S.C. § 553(e) 22
5 U.S.C. § 706 7
5 U.S.C. § 706(1) ..... *passim*
5 U.S.C. § 706(2)(A) 17
16 U.S.C. § 1131(c) 3
16 U.S.C. § 1132(b) 3
42 U.S.C. § 4332(2)(C) 5
43 U.S.C. §§ 1701-1784 3
43 U.S.C. § 1712(f) 4
43 U.S.C. § 1732(a) 4
43 U.S.C. § 1782(a) 3
43 U.S.C. § 1782(c) 3-4, 6, 18, 21
40 C.F.R. §§ 1500-1508 5
40 C.F.R. § 1502.9(c)(1)(ii) 5
43 C.F.R. § 1610.2 4
43 C.F.R. § 1610.5-3(a) 5, 20
FED. R. CIV. P. 54(b) 8

MISCELLANEOUS

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice* (8th ed. 2002) 11
Attorney General's Manual on the Administrative Procedure Act (1947) 21-22
http://www.ut.blm.gov/sanrafaelohv/wthedecision.htm 19
http://www.ut.blm.gov/sanrafaelohv/wtheplan.htm 6

INTRODUCTION

Petitioners in this case sought the dismissal under Rule 12(b)(1) of Respondents' (collectively "SUWA's") claims that the Bureau of Land Management (BLM) violated three of the agency's mandatory statutory duties: (1) the duty under the Federal Land Policy and Management Act (FLPMA) to prevent the impairment of wilderness study areas (WSAs), 43 U.S.C. § 1782(c); (2) the duty under FLPMA to "manage the public lands . . . in accordance with . . . land use plans," 43 U.S.C. § 1732(a); and (3) the duty under the National Environmental Policy Act (NEPA) to determine whether new information triggers the agency's duty to prepare supplemental environmental analyses. In the course of the proceedings below, BLM admitted that: (1) the agency *was* allowing the four WSAs at issue to be impaired by off-road vehicle (ORV) use; (2) the agency had *not* taken the particular actions set out in the two relevant land use plans; and (3) the agency had *never* considered whether the explosive increase in ORV use required it to prepare supplemental NEPA analyses for the five BLM areas identified by SUWA. BLM App. at 25a-26a, 32a-33a; App. at 58-59.[1] Despite these admissions and the overwhelming evidence that BLM had failed to satisfy these statutory mandates, the agency argues that the district court did not even have authority to consider the merits of SUWA's claims. The Tenth Circuit correctly rejected petitioners' arguments and further review by this Court is unwarranted.

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[1] This brief refers to the Petition for a Writ of Certiorari filed by Gale Norton *et al.* as "BLM Pet." and its appendix as "BLM App." The Petition for a Writ of Certiorari filed by the Utah Shared Access Alliance *et al.* (the "ORV Intervenors") is cited as "ORV Pet." The appendix to the instant opposition to the petitions is cited to as "App."

First, the procedural posture of this appeal renders it an unfit vehicle for Supreme Court review. Because this is an interlocutory appeal of a jurisdictional ruling concerning only a subset of SUWA's claims, the concerns raised in the petitions may be clarified or even mooted through further proceedings in the lower courts. This possibility is particularly acute here because, as often occurs when cases are still at an early pleading stage, SUWA's allegations and asserted bases for relief have evolved since the Tenth Circuit issued its decision. In addition, BLM has itself asserted in the courts below that one of the primary claims at issue in its petition is now moot.

Second, the Tenth Circuit's decision does not conflict with any opinion of this Court or of any court of appeals. BLM's effort to manufacture such a conflict mischaracterizes SUWA's claims and the proceedings below. BLM accuses SUWA of mounting a "wholesale" or "programmatic challenge" to BLM's failure to comply with "general statutory standards." BLM Pet. at 9, 12. This is incorrect. SUWA challenged BLM's failure to comply with three discrete and well-defined statutory mandates based on equally discrete facts concerning ORV use on specific BLM lands. Nor did the Tenth Circuit sanction a "programmatic challenge," as BLM claims. The court simply held that the district court had authority under 5 U.S.C. § 706(1) to consider whether the agency had violated specific statutory requirements.

Third, the issues raised by BLM concerning judicial review are not squarely presented in this case. Because of the factual and legal specificity of SUWA's claims, this case does not offer the Court occasion to decide whether courts may hear a "broad programmatic challenge" to the alleged violation of "general statutory standards." Nor does this case present the question of whether the APA empowers a court to compel non-final agency action because the actions that SUWA seeks to compel are, in fact, "final" under the APA.

Fourth, SUWA's unexceptional APA claims are of the sort that have been addressed routinely by courts in the past. The Tenth Circuit's limited ruling allowing this case to proceed broke no new legal ground by holding that the district court had authority to consider whether BLM had failed to comply with clear statutory mandates.

For all of these reasons, the petitions should be denied.

STATEMENT OF THE CASE

A. Statutory Background

1. FLPMA's Nonimpairment Requirement

In 1976, Congress passed FLPMA, 43 U.S.C. §§ 1701-1784, which governs the management of BLM lands. Among many other things, FLPMA required BLM to review and recommend lands for inclusion within the National Wilderness Preservation System. 43 U.S.C. § 1782(a). In order to be eligible for wilderness designation, an area must generally be at least 5,000 acres in size and "generally appear[] to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable." 16 U.S.C. § 1131(c).

By 1984, BLM had concluded that 3.2 million acres of its lands in Utah qualified as potential wilderness. These areas are called "wilderness study areas," or "WSAs." Because Congress – the sole body legally capable of designating wilderness areas, 16 U.S.C. § 1132(b) – has not yet designated these areas as wilderness or determined that it will not do so, these 3.2 million acres remain classified as WSAs and must be managed pursuant to § 603(c) of FLPMA, 43 U.S.C. § 1782(c). That section mandates that:

> During the period of review of such areas [*i.e.*, WSAs] and until Congress has determined otherwise, the Secretary *shall continue to manage such lands* according to his authority under this Act

> and other applicable law in a manner *so as not to impair the suitability of such areas for preservation as wilderness*.

43 U.S.C. § 1782(c) (emphases added). Through this requirement – which is referred to colloquially as the "nonimpairment mandate" – Congress has reserved to itself the final say as to whether WSAs ultimately become designated wilderness.

BLM interprets FLPMA's nonimpairment requirement through its Interim Management Policy (IMP). *See Sierra Club v. Hodel*, 848 F.2d 1068, 1086 (10th Cir. 1988), *overruled on other grounds, Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). In the IMP, BLM determined that WSAs are "impaired" in violation of FLPMA whenever ORV riders drive off-road because "the tracks created by the vehicles leave depressions or ruts, compact the soils and trample or compress vegetation." BLM App. at 15a n.7.

2. FLPMA Land Use Planning And The Accompanying Environmental Review Process

The Utah BLM is divided into field offices for purposes of management and administration. FLPMA requires each BLM field office to develop a land use plan for its area pursuant to a process that affords extensive opportunities for public involvement and environmental review under NEPA. *See* 43 U.S.C. § 1712(f) (public participation requirement); 43 C.F.R. § 1610.2 (same). Land use plans specify which activities – from mining to camping – will be permitted, and the location and conditions under which they will be allowed. 43 U.S.C. § 1732(a).

FLPMA mandates that BLM "shall manage the public lands . . . in accordance with . . . land use plans." 43 U.S.C. § 1732(a). This mandatory language is echoed in FLPMA's

implementing regulations, which declare that "[a]ll future resource management authorizations and actions . . . *shall conform to the approved plan.*" 43 C.F.R. § 1610.5-3(a) (emphasis added).

Prior to finalizing a land use plan, BLM must comply with the public participation and environmental review requirements of NEPA, which require a federal agency to prepare an environmental impact statement (EIS) for major federal actions, such as land use plans, that may significantly affect the environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1500-1508 (NEPA regulations). BLM's NEPA duties do not end once the agency completes its initial EIS for a FLPMA land use plan. NEPA's regulations require federal agencies to "prepare supplements to either draft or final environmental impact statements if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R § 1502.9(c)(1)(ii). *See also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989); *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996).

B. The Proceedings Below

ORVs pose a significant threat to the ecological health of the fragile desert lands managed by BLM in Utah and have eroded the soils, trampled vegetation, destroyed cultural relics, harmed water quality, harassed wildlife, and destroyed wildlife habitat. App. at 8-12 (second amended complaint).

Although BLM was required by NEPA to consider the environmental impacts of ORV use when it issued its Utah land use plans and decided where and how ORVs could be used, many of those plans are decades old and were prepared prior to the recent dramatic increase in ORV use in Utah. As a result, BLM's environmental analyses for many of its land use plans in Utah assumed far lower levels of ORV use – and

far less environmental impact – than actually is occurring today.

Even under the less pervasive ORV use of the past, several plans recognized and sought to address the ecological damage done by unrestricted ORV use. Two instances are relevant to these proceedings. The first is the 1991 San Rafael Resource Management Plan, which limited ORV use to designated roads and trails. However, the 1991 Plan left the actual designation of particular routes to a separate San Rafael Route Designation Plan, *which the agency committed to complete by 1992*. That Designation Plan still had not been completed when SUWA filed this case in 1999.

The second relevant land use plan commitment is set out in the 1990 Henry Mountains ORV Implementation Plan. Because BLM was particularly concerned with the damaging impacts of ORVs in the Factory Butte area, the 1990 Plan obligated BLM to conduct an intensive ORV monitoring program to determine whether ORV use should be restricted. BLM App. at 25a. BLM admitted that it had not conducted the required monitoring when SUWA filed this action a decade later. *Id.* at 25a-26a.[2]

Prior to filing this lawsuit, SUWA met with and wrote to BLM personnel to demand that the agency comply with particular legal duties concerning ORV use. SUWA specifically: (1) detailed the environmental damage being caused by ORVs in WSAs; (2) noted that this damage constituted "impairment" under 43 U.S.C. § 1782(c); (3) asked that specific WSAs be closed to ORV travel in order to prevent continued degradation and impairment; and (4)

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[2] Five months after SUWA filed this lawsuit, BLM initiated the long-promised monitoring program at Factory Butte. In addition, on February 3, 2003, BLM released its decade-overdue San Rafael Route Designation Plan. *http://www.ut.blm.gov/sanrafaelohv/wtheplan.htm* (BLM website describing decision).

urged BLM to comply with both of the specific land use plan commitments described *supra* at 6. App. at 50-57.

After failing to convince BLM to comply with its statutory duties, SUWA filed the instant action in late 1999. SUWA's second amended complaint presented ten causes of action under the APA, 5 U.S.C. § 706.[3] In 2000, SUWA moved for a preliminary injunction on four claims, three of which are relevant here: (1) that BLM had violated FLPMA's nonimpairment mandate by allowing ORVs to impair four specific WSAs; (2) that BLM had violated FLPMA's land use plan consistency requirement by failing to complete the San Rafael Route Designation Plan and by failing to conduct intensive ORV-monitoring in the Factory Butte area; and (3) that BLM had violated NEPA by failing to determine whether increases in ORV use triggered the agency's duty to supplement several particularly outdated NEPA analyses. SUWA asked the district court to issue a preliminary injunction prohibiting ORV use within the affected areas.

After hearing testimony, the district court concluded that SUWA had presented "significant evidence" that the alleged impairment "is occurring in the WSAs due to ORV use." BLM App. at 65a. The court ruled, however, that it lacked jurisdiction to consider SUWA's nonimpairment claim because FLPMA leaves BLM with "management options" regarding how the mandate could be satisfied, and because the agency had taken some minimal steps towards satisfying the mandate. *Id.* at 64a, 66a. The court held that it lacked jurisdiction to consider SUWA's land use plan consistency

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[3] On July 23, 2003, SUWA filed a third amended complaint, which did not include several of SUWA's earlier claims, narrowed SUWA's surviving claims, and, unlike its earlier complaints, stated explicitly that BLM's failures were "arbitrary, capricious, and otherwise not in accordance with law." App. at 41-45 (quoting 5 U.S.C. § 706(2)(A)).

claims because, in its view: (1) the agency had taken some steps to comply with those plans; and (2) the claim concerned management actions rather than the administration of future site-specific actions. *Id.* at 67a-68a. Finally, the court believed that it lacked jurisdiction over SUWA's supplemental NEPA claim because such claims involve agency expertise and thus, in the district court's view, could not be enforced pursuant to the APA. *Id.* at 74a. Having dismissed the claims to the extent they applied to the areas addressed in SUWA's preliminary injunction motion, the court denied that motion as moot. *Id.* at 76a. On February 9, 2001, the district court issued a Rule 54(b) certification entering final judgment on the claims raised in SUWA's preliminary injunction motion. App. at 48-49.

The Tenth Circuit, in an opinion written by Judge Ebel, reversed and remanded for further proceedings on the dismissed claims. BLM App. at 1a-39a. The court stated at the outset that, under § 706(1), "federal courts may order agencies to act only where the agency fails to carry out a mandatory, nondiscretionary duty." *Id.* at 10a. Jurisdiction exists in this case, the court concluded, because the duties SUWA seeks to enforce, including the nonimpairment duty, are each mandatory and non-discretionary. *Id.* at 5a, 26a, 34a-35a, 38a. The court rejected BLM's claim that jurisdiction is defeated because FLPMA leaves BLM with some discretion as to how to satisfy the nonimpairment requirement. *Id.* at 12a-15a. While this discretion may go to the merits of SUWA's nonimpairment claim or the propriety of any injunctive relief, it did not deprive the court of jurisdiction. *Id.* at 14a.

The court then rejected BLM's argument that a mandatory statutory duty is unenforceable if an agency may be able to satisfy that duty through non-final action. BLM's position, the court held, "read[s] finality in an inappropriately cramped manner" by ignoring the fact that an agency's failure to carry out a mandatory statutory duty is

equivalent under the APA to a final decision declaring that it will not comply with the duty. *Id.* at 16a-18a. The court also rejected BLM's "final action" argument because: (1) it was inconsistent with case law indicating that a court may compel an agency to satisfy a duty even if the agency has discretion concerning how the duty may be satisfied; (2) it would create a "no-man's land" of judicial review where agencies could flout mandatory statutory duties; and (3) many of the steps that BLM might take to prevent impairment would be final action, including the road closures sought by SUWA in its preliminary injunction motion. *Id.* at 18a n.10.[4]

The court also rejected the argument that an agency can immunize itself from § 706(1) review by taking some steps – no matter how insubstantial or ineffective – towards someday satisfying its statutory mandate. While "BLM should be credited for the actions it has taken to comply with the nonimpairment mandate," the court explained, "it does not follow [that those steps] ... deprive[] a court of subject matter jurisdiction to determine whether it ha actually fulfilled the statutorily mandated duty and potentially compel action if that duty has not been fulfilled." *Id.* at 20a.

The Tenth Circuit also reversed the district court's ruling that it was unable to review SUWA's land use plan claim. Dismissal was improper, the Tenth Circuit concluded, because "a straightforward reading of the relevant L[and] U[se] P[lans], as well as applicable statutes and regulations,

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[4] BLM states that the Tenth Circuit concluded that courts have jurisdiction over "'day-to-day management actions' such as BLM's ongoing management of the wilderness study areas." BLM Pet. at 7. This is incorrect. The Tenth Circuit's reference to "day-to-day management actions," which BLM quotes in its petition, is drawn from BLM's characterization of the issue in its own Tenth Circuit brief. BLM App. at 15a-16a. The Tenth Circuit never adopted this view of the issue.

suggests that the BLM must carry out specific activities promised in the" plans. *Id.* at 26a-27a. While "BLM can draft L[and] U[se] P[lan]s in a way that optimizes the agency's ability to respond to changing circumstances and conditions . . . , BLM cannot 'ignore the requirements of the . . . Plan'" *Id.* at 27a (quoting *Sierra Club v. Martin*, 168 F.3d 1, 4 (11th Cir. 1999)); *see also id.* at 29a-30a (rejecting lower court's view that BLM need only comply with its land use plans when the agency undertakes future, site-specific projects).

While Judge McKay dissented from the majority's nonimpairment and plan consistency holdings, the panel unanimously reversed the district court's dismissal of SUWA's supplemental NEPA claim. The district court, the Tenth Circuit concluded, has jurisdiction over SUWA's claim that unanticipated increases in ORV use in several areas triggered BLM's duty to determine whether the agency must prepare supplemental environmental analyses. *Id.* at 37a-39a.

REASONS FOR DENYING THE PETITION

I. The Procedural Posture Of This Case Renders It An Inappropriate Candidate For Supreme Court Review.

This Court has a long tradition of declining petitions for review in cases whose claims have not each been fully resolved by the lower courts. *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari). This tradition is based on the "pruden[ce]" inherent in allowing lower courts to resolve and clarify issues so that this Court may conserve its limited resources. *Id.*; *see also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (certiorari jurisdiction is "to be exercised sparingly . . . [a]nd, except in

extraordinary cases, the writ is not issued until final decree"); *American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893). As the Solicitor General has noted many times, where "the court of appeals [has] remanded the case to the district court . . . this Court ordinarily does not review interlocutory decisions." *See, e.g.*, Cert. Op. at 6, *Tocco v. United States*, No. 02-1225 (2003); Cert. Op. at 11, *Hsia v. United States*, No. 99-680 (1999). Where further proceedings remain, issues raised in a petition for a writ of certiorari may be mooted or narrowed in the lower courts, sparing this Court from expending its resources inefficiently. *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, Supreme Court Practice § 4.18 at 260 (8th ed. 2002) ("in the absence of [an] unusual factor, the interlocutory nature of a lower court judgment will generally result in the denial of certiorari").

Further proceedings in the courts below may moot or narrow petitioners' concerns in this case. While BLM raises the ominous prospect of intrusive judicial relief that would "significantly disrupt[]" the government's ability to manage the public lands, BLM Pet. at 27, no such relief has been granted in this case. Because SUWA's claims were dismissed at such an early stage, the courts below have never had the opportunity to determine whether SUWA should prevail on the merits, let alone the nature of any appropriate injunctive relief. The Tenth Circuit decided only that SUWA had a right to pursue its claims and the court was at pains to stress the "narrow" nature of its ruling and to emphasize that the merits of SUWA's claims will "need to be addressed on remand." BLM App. at 3a.

On remand, the lower courts might find that SUWA's claims fail on the merits, that equitable considerations do not justify the relief that SUWA seeks, that SUWA is entitled to such relief on wholly separate grounds, or that some other form of injunctive relief is more appropriate. A court might, for instance, order BLM to comply with the nonimpairment

mandate and carry out its land use plan commitments within a specified time and detail consequences for any failure to do so. Alternatively, a court might provide an interpretation of BLM's nonimpairment duty under FLPMA and require the agency to act in light of that interpretation.[5] Given the range of plausible outcomes, it is wholly uncertain to what extent – if any – petitioners' concerns may ultimately present themselves in this litigation. Only by denying the petitions and allowing this case to proceed in the courts below will that uncertainty be resolved.

Further militating against Supreme Court review at this point is the fact that the proceedings thus far have dealt with only a subset of SUWA's claims. *See supra* at 7. Granting the petitions for a writ of certiorari at this point could result in a piecemeal review of just the sort disfavored by this Court. *See Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2557 (2003) (dismissing a writ as improvidently granted and noting that "even if we were to decide the First Amendment issues presented to us today, more First Amendment issues might well remain in this case, making piecemeal review of the Federal First Amendment issues likely") (Stevens, J., concurring in dismissal of writ as improvidently granted). Furthermore, the presence of additional claims raises the possibility that SUWA may win injunctive relief pursuant to one of its as-yet-unadjudicated claims, in which case this Court's efforts would have no impact on the ground in Utah.[6]

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[5] If the court were to take this route, it would be exercising what even BLM admits is a court's legitimate ability to "require an agency to take action upon a matter, without directing how it shall act." BLM Pet. at 16 (quoting Attorney General's Manual on the Administrative Procedure Act (1947) at 108).

[6] The picture here is clouded still further by the fact that SUWA's third amended complaint altered its legal claims by alleging that BLM's inaction has been "arbitrary, capricious, or otherwise not in accordance with law." App. at 41-45 (quoting 5

A final reason for denying review, particularly over SUWA's land use plan consistency claim, is that BLM has begun to implement the provisions that underlie SUWA's claim. *Supra* at 6 n.2. BLM argued below that the agency's compliance with these long-ignored obligations moots SUWA's claim. BLM App. at 31a n.17 (Tenth Circuit acknowledging BLM's mootness argument). This Court ought not spend its scarce resources resolving claims that might be dismissed on remand as moot.

II. The Decision Below Does Not Conflict With Any Decision Of This Court Or Of Any Court Of Appeals.

BLM bases its petition in large part on an alleged conflict between the decision below and *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). No such conflict exists.

First, *Lujan* deals exclusively with standing. This is apparent from the opening line of the *Lujan* opinion, which declares that "[i]n this case we must decide whether respondent...is a proper party to challenge actions of the Federal Government." *Lujan*, 497 U.S. at 875. The opinion never cites 5 U.S.C. § 706(1), the section at issue here, and never considers the extent of a court's authority to consider claims that an agency has failed to comply with statutory mandates. Accordingly, there is no direct conflict with *Lujan* which would warrant Supreme Court review.

Second, the portion of *Lujan* upon which BLM relies turned entirely upon the programmatic nature of the plaintiffs' claims in that case. BLM Pet. at 11-12 (discussing *Lujan*, 497 U.S. at 891-94). Rather than challenge any specific agency decision or failure to act, the plaintiffs in *Lujan* sought "wholesale" improvement in the government's so-called "land withdrawal review program," which was

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U.S.C. § 706(2)(A), a provision that is not addressed in either of the petitions to this Court).

plaintiffs' shorthand reference for all of the 1,250 or so discrete public lands management decisions made pursuant to a host of FLPMA requirements. *Lujan*, 497 U.S. at 875-89. Although the plaintiffs alleged that legal violations were rampant within the "program," they did not narrowly challenge the government's failure in any particular instance to comply with any particular statute.[7] Indeed, the claims in that case were so exceptionally broad that the *Lujan* court understood the plaintiffs to be challenging even "actions yet to be taken." *Id.* at 893. Given their exceptional breadth, it is not surprising that the *Lujan* court saw plaintiffs' claims as an attempt at the "wholesale improvement of this program by court decree." *Id.* at 891.

SUWA's claims bear no resemblance to the sweeping programmatic claims raised in *Lujan*. Unlike the plaintiffs in *Lujan*, the three claims pursued in SUWA's preliminary injunction motion challenge BLM's failure to comply in particular respects with specific and well-defined legal duties on particular BLM lands. The first claim alleged that BLM was violating FLPMA's nonimpairment duty in four specific WSAs. *See* BLM App. at 6a-7a n.3. The second claim alleged that BLM's failure to comply with two area-specific land use plan provisions violated FLPMA's land use plan

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[7] BLM cites *Lujan* for the proposition that judicial review is not available to address an agency's failure to revise its land use plans, failure to prepare an adequate EIS, failure to consider multiple uses, and failure to provide the statutorily required public notice. BLM Pet. at 17. BLM misreads *Lujan*. This Court made plain in that case that any of these failures could be challenged on a "case-by-case" basis. *Lujan*, 497 U.S. at 894. What a plaintiff may not do under *Lujan* is to seek the wholesale improvement of an agency's behavior by alleging generally that some agency "program" is riddled with illegality. Because SUWA has challenged BLM's failure to take specific actions for violating specific statutes, the Tenth Circuit's decision below does not conflict with *Lujan*.

consistency requirement. *Id.* at 25a-26a. The third claim alleged that BLM violated NEPA by failing to determine whether dramatic increases in ORV use in five specific areas in Utah triggered the agency's duty to supplement particular NEPA analyses. *Id.* at 32a. Thus, SUWA has done what the *Lujan* plaintiffs did not: it specified clear legal obligations being violated in specific areas and sought to compel specific agency actions to bring BLM into compliance with the law.

BLM's claim that this case conflicts with *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000), is similarly unconvincing. BLM Pet. at 9. Like the plaintiffs in *Lujan*, the Sierra Club in *Peterson* raised a sweeping challenge to an agency's entire program. Rather than challenge any particular timber sale on the grounds that it violated a particular statute, the Sierra Club challenged the Forest Service's general management approach over the prior two decades on the Texas national forests. *Id.* at 563-64.

SUWA's claims are entirely different from the program-wide claim pursued by the Sierra Club in *Peterson*. First, while the Sierra Club raised programmatic claims that swept across every acre of the Texas national forests, SUWA's claims target site-specific legal violations. Second, while the Sierra Club tried to use *past* legal violations to enjoin all *future* timber sales – future sales that the Club had not actually proven would be illegal – SUWA seeks site-specific relief that would remedy the existing harm caused by the agency inaction that gave rise to SUWA's claims. Third, whereas the source of the alleged violations in *Peterson* were affirmative agency actions – *i.e.*, past timber sales – that the Sierra Club tried to recast, in the alternative, as instances of inaction, the violations complained of by SUWA stem from true failures to act: BLM's failure to prevent cross-country ORV travel from impairing four WSAs, failure to comply with the requirements of two land use plans, and failure to

determine whether new information triggered the duty to prepare five supplemental NEPA analyses.[8]

This case is distinguishable from *Lujan* and *Peterson* in another important respect. Whereas the courts stressed in both of those cases that the plaintiffs could pursue their challenges on a case-by-case basis, BLM's arguments in this case would leave SUWA without any legal remedy. *Lujan*, 497 U.S. at 894; *Peterson*, 228 F.3d at 568-69; *see also id.* at 571-72 (Higginbotham, J., concurring). Before any environmental impact is felt from a land withdrawal or timber sale decision of the sort at issue in *Lujan* or *Peterson*, the agency must take formal action by approving the withdrawal decision or timber sale. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 729-30 (1998) (discussing two-stage process for timber sales). As the *Lujan* and *Peterson* courts appreciated, such decisions are final agency actions that may be challenged and enjoined in a site-specific case.

The instant case is quite different. Unlike logging and land withdrawals, no additional final agency action is necessary for cross-country ORV use in Utah's WSAs to continue and expand into the future, thereby furthering the impairment of the WSAs that Congress ordered protected.

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[8] ORV Intervenors suggest that the decision below is inconsistent with *Ecology Center. Inc. v. United States Forest Service*, 192 F.3d 922 (9th Cir. 1999), which they insist stands for the proposition that courts lack jurisdiction under § 706(1) if an agency has taken *some* action towards someday satisfying its statutory duty. ORV Pet. at 25. However, in *Montana Wilderness Ass'n v. United States Forest Serv.*, 314 F.3d 1146, 1151 (9th Cir. 2003), *petitions for cert. filed*, 72 U.S.L.W. 3106 (U.S. July 22, 2003) (No. 03-109); 72 U.S.L.W. 3106 (U.S. July 22, 2003) (No 03-123), a subsequent Ninth Circuit panel (which included two of the judges from *Ecology Center*), rejected this reading of *Ecology Center. See also Center for Biological Diversity v. Veneman*, 335 F.3d 849, 857 (9th Cir. 2003).

Because no further agency action is required, SUWA may *never* have the opportunity to challenge BLM's violation of the nonimpairment requirement in the context of an affirmative challenge to an agency action.[9] Therefore, if SUWA cannot challenge an agency's violation of the nonimpairment mandate under 5 U.S.C. § 706(1), the agency could evade judicial review indefinitely by allowing ORVs to impair WSAs and never taking any final agency action to prevent the impairment.

III. The Issues That BLM Raises In Its Petition Are Not Presented In This Case.

BLM asks this Court to grant its petition for a writ of certiorari so that the Court may resolve two questions concerning judicial review: (1) whether a court may hear a "broad programmatic challenge" to the alleged violation of "general statutory standards"; and (2) whether a court may hear a challenge to agency inaction when the missing action would not itself be a "final agency action" under the APA. Neither issue, though, is presented in this case.

As pointed out above, none of the claims pursued by SUWA in the preliminary injunction proceedings was "general" or "programmatic" in nature. Rather, SUWA challenged BLM's failure to take a specific action or meet a

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[9] ORV Intervenors' suggestion that SUWA could challenge individual trail closure decisions, ORV Pet. at 19, ignores the fact that this case challenges BLM's failure to impose just such restrictions. Furthermore, the fact that BLM has taken *some* final actions concerning ORV use somewhere in Utah – mostly in response to this lawsuit – does not mean that SUWA can pursue its nonimpairment claims through 5 U.S.C. § 706(2)(A) challenges to final agency action, as the ORV Intervenors assume. In a challenge to the adequacy of a discrete ORV closure in one corner of Utah, SUWA could not argue that the closure violates the law because it fails to adequately protect WSAs in another corner of the State.

specific legal requirement in a specific area. *See supra* at 14-16. Because none of these claims presents a "programmatic challenge" or involves "general" statutory duties, BLM's concerns with judicial review of such claims cannot justify Supreme Court consideration.

Nor does this case give rise to BLM's second concern: whether a court may hear a challenge to an agency's failure to take non-final action.[10] In its motion for preliminary injunction, SUWA asked the court to order BLM to close several WSAs to ORV travel in order to prevent the impairment of the areas in violation of 43 U.S.C. § 1782(c). This Court has explicitly recognized that such road closure decisions are final agency actions subject to APA challenge. *Ohio Forestry*, 523 U.S. at 738-39; *see also Mausolf v. Babbitt*, 125 F.3d 661, 669-70 (8th Cir. 1997); BLM App. at 18a n.10 (describing other final actions that BLM might take to prevent impairment).

BLM's assertion that SUWA is seeking to compel non-final agency action through its land use plan consistency claim is likewise unavailing.[11] BLM is simply wrong when it relies upon *Ohio Forestry* for the proposition that all land use plan provisions, including those invoked by SUWA in this case, are merely "antecedent ... planning activities" that do not "create any legal rights or obligations." BLM Pet. at 23-24. In fact, while this Court held in *Ohio Forestry* that a challenge to the logging allowed by a particular forest plan was not ripe for review because no trees could be cut until a

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[10] BLM does not argue that there is a circuit split concerning whether a court may compel non-final action. Indeed, the agency fails to provide a single citation to case authority from any level that holds that only "final" action may be compelled.

[11] Since the filing of this lawsuit, BLM has begun to comply with the two management commitments whose performance SUWA sought to compel in this case. *See supra* at 6 n.2.

second stage of decision-making had taken place, *Ohio Forestry*, 523 U.S. at 732-37, this Court recognized that forest plans do make some decisions that have an immediate impact and that those decisions may be challenged immediately, *id.* at 738-39.

The land use plan decisions at issue here are just the sort of final actions recognized in *Ohio Forestry*. Contrary to BLM's assertion that the San Rafael Route Designation Plan would not "alter the legal regime ... in any respect concerning off-road vehicle use," BLM Pet. at 23 (quoting *Ohio Forestry*, 523 U.S. at 733), the route designation decisions made in that document determine which routes will be closed and which will be open to ORV use by the public. *See* http://www.ut.blm.gov/sanrafaelohv/wthedecision.htm (announcing that the route designation decision leaves 677 miles of vehicle routes open to ORVs and closes 468 miles to ORVs). Such route closure orders are explicitly mentioned in *Ohio Forestry* as the sort of planning decision that may be challenged immediately. *Ohio Forestry*, 523 U.S. at 738-39.[12] Indeed, the government itself admitted in its briefing and again at oral argument in *Ohio Forestry* that road closure decisions made in plans may be challenged immediately. *Id.* at 739.[13]

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[12] The San Rafael Route Designation Plan is, in fact, the subject of several pending challenges by ORV advocates before the Interior Board of Land Appeals. *See Huck v. BLM*, IBLA No. 2003-169; *Telepak v. BLM*, IBLA No. 2003-170; *Norton v. BLM*, IBLA No. 2003-171; *Southeastern Utah OHV Club v. BLM*, IBLA No. 2003-172.

[13] BLM also seeks review on the basis of its belief that FLPMA's plan consistency provision requires only that independent future projects approved by the agency be consistent with the applicable land use plan and that BLM need not comply with specific affirmative management commitments made by the agency in its plans. BLM Pet. at 24. This argument goes to the

BLM's concern that SUWA seeks to compel non-final agency action in its supplemental NEPA claim is similarly misplaced. BLM is simply incorrect when it asserts that the NEPA decision document sought by SUWA is not a final agency action. BLM Pet. at 21. An agency's decision whether or not it will prepare a supplemental NEPA document marks the end of that decision-making process and, as such, has always been treated by this Court and others as a final and challengeable action. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989); *South Trenton Residents Against 29 v. Federal Highway Admin.*, 176 F.3d 658, 662-64 (3rd Cir. 1999); *Hughes River*, 81 F.3d at 442-46; *Village of Grand View v. Skinner*, 947 F.2d 651, 657 (2d Cir. 1991).[14] There is no circuit split or other reason to

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merits of SUWA's claims and has nothing to do with subject matter jurisdiction. In any case, the Tenth Circuit rightly rejected BLM's argument as contrary to the "simpl[e] and straightforward[]" terms of FLPMA and its regulations. BLM App. at 29a. 43 C.F.R. § 1610.5-3(a) states that *"[a]ll future resource management* authorizations and *actions . . . shall* conform to the approved plan." (Emphasis added.) Because the 1990 Henry Mountains ORV Implementation Plan declares that BLM will conduct intensive monitoring at Factory Butte, the only way that BLM can "conform" its management actions to this provision is to do the promised monitoring. By the same token, because the 1991 San Rafael Resource Management Plan decides that BLM will limit ORV use to designated trails in the San Rafael area, the agency can "conform" its actions to the plan only by following through with the trail designations.

[14] BLM's claim that SUWA's supplemental NEPA challenge is not related to any final agency action also ignores the ongoing impact of decisions made in the land use plans at issue in this case. Based on the NEPA analyses that accompanied the adoption of the land use plans, those plans provided that millions of acres would be open to unrestricted ORV use. The impacts of those decisions are not limited to the moment the plans were adopted, but rather are felt throughout the life of the plans. Thus, far from being

justify reviewing this consistent treatment of supplemental NEPA claims.[15]

IV. The Tenth Circuit's Decision To Allow SUWA's Unexceptional APA Claims To Proceed Is Consistent With The Treatment Of Such Claims By Other Courts.

Section 706(1) empowers courts to compel federal agencies to comply with mandatory statutory duties. FLPMA unquestionably imposes such a duty by mandating that BLM "shall" manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). *See Bennett v. Spear*, 520 U.S. 154, 175 (1997) ("any contention that the relevant provision of [law] . . . is discretionary would fly in the face of its text, which uses the imperative 'shall'").

It is well settled that § 706(1) may be used to compel an agency to exercise its discretion when the exercise of that discretion is statutorily required. For example, in the 1947 Attorney General's Manual on the APA, the authors noted in their discussion of § 706(1) that "a court may require an agency to take action upon a matter, without directing how it

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"divorced from" any major federal action, as BLM claims (BLM Pet. at 22), SUWA's supplemental NEPA claim is tied to the effects of major federal actions that are still having significant ongoing environmental impacts.

[15] BLM also objects that SUWA's supplemental NEPA claim could "intrude" upon BLM's planning activities, thereby diverting its resources "from the activities chosen by the agency." BLM Pet. at 10, 28. If anything, this argument goes to the merits or relief for the NEPA claim; it has nothing to do with a court's authority under the APA. Moreover, if jurisdiction over failure-to-act claims turned on whether an agency would choose to focus on other activities, jurisdiction would never exist because failure-to-act claims, by definition, involve an agency that has chosen to ignore its statutory duty and spend its resources elsewhere.

shall act." Attorney General's Manual on the Administrative Procedure Act, at 108 (1947). SUWA's nonimpairment claim fits this "mandatory-exercise-of-discretion" paradigm perfectly; SUWA asked the district court to compel BLM to exercise its management discretion so as to satisfy the agency's mandatory duty under FLPMA to prevent the impairment of four specific WSAs. [16]

The unexceptional nature of SUWA's nonimpairment claim is underscored by the many analogous cases in which courts have considered inaction claims under the APA. For example, in *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149 (1st Cir. 1987), then-Judge Breyer held that HUD's failure to comply with its ongoing statutory obligation to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies" set forth in the Fair Housing Act was subject to judicial review under § 706(1). *Id.* at 151, 160. In doing so, Judge Breyer concluded that the APA's "broad presumption in favor of judicial review of agency action" is not overcome by the agency's discretion concerning precisely how to discharge its

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[16] BLM asserts that SUWA's claims should be rejected because doing so will force the public to first petition BLM for a change in land management under 5 U.S.C. § 553(e), thus affording agencies the opportunity to make a final challengeable decision regarding the public's concerns. BLM Pet. at 18. This argument suffers from many flaws. First, SUWA did, in fact, request that BLM comply with its statutory duties to restrict ORV in many of the areas at issue here. *See* text *supra* at 6-7. This case arose when BLM failed to respond. Second, quite apart from § 553(e)'s rulemaking procedure, the APA specifically provides for challenges to agency inaction. *See* 5 U.S.C. § 551(13) (challengeable "agency action" includes the "failure to act"). Third, § 553(e) applies only to petitions for new rules and has nothing to do with forcing an agency to comply with existing law and regulation, as SUWA is seeking to do in this case.

legal duties. *Id.* at 157 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967)).

The principle that a plaintiff may challenge an agency's failure to comply with a statutory duty that involves the exercise of agency discretion has been recognized by appellate courts across the nation. *See Darst-Webbe Tenant Ass'n Bd. v. St. Louis Housing Auth.*, 339 F.3d 702, 712-14 (8th Cir. 2003); *Public Citizen Health Research Group v. Commissioner, Food & Drug Admin.*, 740 F.2d 21, 32-35 (D.C. Cir. 1984); *Center for Biological Diversity v. Veneman*, 335 F.3d 849, 853-57 (9th Cir. 2003) (court has the power under 5 U.S.C. § 706(1) to compel Forest Service to comply with duty to consider the effects of its planning decisions on 57 identified rivers); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999) (compelling the Fish and Wildlife Service under § 706(1) to designate Endangered Species Act "critical habitat" even though the designation decision involves an exercise of discretion and agency expertise); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 349-52 (8th Cir. 1985) (permitting review under APA of Secretary of Agriculture's failure to implement disaster relief programs); *Adams v. Richardson*, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973) (upholding action against HEW under APA for failure to enforce antidiscrimination provisions of Title VI).

The Ninth Circuit reached the same conclusion in *Montana Wilderness Ass'n v. United States Forest Service*, 314 F.3d 1146 (9th Cir. 2003), in which the court affirmed the district court's authority to decide whether the Forest Service violated a comparable nonimpairment duty in its management of WSAs in Montana. In that case, the government argued, as it does here, that the courts may not hear a challenge under § 706(1) to the agency's failure to satisfy this mandatory duty because the statute does not prescribe the precise manner in which the Forest Service is to satisfy this nonimpairment requirement. *Id.* at 1151. Judge

Trott, writing for a unanimous panel, rejected the government's characterization of the nonimpairment requirement as a "general" statutory duty and instead concluded that it:

> establishes a management directive requiring the Forest Service to administer the Study Areas to "maintain" wilderness character and potential for inclusion in the Wilderness System. . . . *[T]he Forest Service's duty to maintain wilderness character and potential is a nondiscretionary, mandatory duty that it may be compelled to carry out under section 706(1).*

Montana Wilderness, 314 F.3d at 1151 (emphasis added).

As these cases demonstrate, Congress often imposes a mandatory duty to achieve or avoid some end without saying exactly how the agency must satisfy that mandate. These mandatory duties are as binding and justiciable under the APA as any others.[17] Contrary to BLM's suggestion, treating them as such is in no way contrary to the mandamus principles from which it claims § 706(1) was derived. BLM Pet. at 15-17. Courts may issue writs of mandamus even if a statute leaves an agency with some discretion about how to

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[17] BLM warns darkly that such inaction claims will "almost inevitably" require a court to substitute its judgment for an agency on a "grand scale." BLM Pet. at 17. The agency's fear is unwarranted. The court's role in assessing such inaction claims is simply to determine whether, in fact, the agency is meeting the statutory requirement (in this case, preventing the impairment of the specific WSAs), and, if necessary, to fashion appropriate injunctive relief. Far from "significantly disrupt[ing]" public lands management, BLM Pet. at 27, the public would be forcing BLM to manage those lands in keeping with Congress's command. This is exactly the role that the APA's review provisions are meant to allow the courts to play.

satisfy a mandatory requirement. As this Court has recognized, mandamus may be used "to compel action, when refused, *in matters involving judgment and discretion . . . .*" *Wilbur v. United States ex rel. Kadrie,* 281 U.S. 206, 218 (1930) (emphasis added). *See also Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 832 (9th Cir. 2002) ("While it is true that the writ of mandamus is chiefly used to compel the performance of a ministerial duty, '[i]t also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion'") (quoting *Miguel v. McCarl*, 291 U.S. 442, 451 (1934)); *Marquez-Ramos v. Reno*, 69 F.3d 477, 479 (10th Cir. 1995) ("*even in an area generally left to agency discretion*, there may well exist statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised. In these situations, *mandamus will lie when the standards have been ignored or violated*") (quoting *Carpet, Linoleum & Resilient Tile Layers v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981)) (emphasis added); *Flynn v. Schultz*, 748 F.2d 1186, 1194 (7th Cir. 1984); *Davis Assocs., Inc. v. Secretary, Dep't of Hous. & Urban Dev.*, 498 F.2d 385, 389 & n.5 (1st Cir. 1974); *Edgerton v. Kingsland*, 168 F.2d 128, 130 (D.C. Cir. 1947).

This is exactly the case here. Congress imposed a nonimpairment requirement in FLPMA. While FLPMA may leave BLM with discretion regarding how to satisfy this mandate in particular situations, the statute unquestionably removes BLM's discretion to permit impairment. The Tenth Circuit's conclusion that the district court had the authority to review BLM's compliance with the nonimpairment mandate does not warrant Supreme Court review.

CONCLUSION

The Petitions for a Writ of Certiorari should be denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SOUTHERN UTAH WILDERNESS ALLIANCE a Utah non-profit corporation, THE WILDERNESS SOCIETY, a national non-profit corporation, THE SIERRA CLUB, a California non-profit corporation, THE GREAT OLD BROADS FOR WILDERNESS, a Utah non-profit corporation, WILDLANDS CPR, a Montana non-profit corporation, UTAH COUNCIL OF TROUT	*	Case No. 2:99CV 852 K Judge Kimball Magistrate Boyce **SECOND AMENDED COMPLAINT**

UNLIMITED, a Utah non-profit organization, AMERICAN LANDS ALLIANCE, a national non-profit corporation, and THE FRIENDS OF THE ABAJOS, a Utah non-profit corporation,

Plaintiffs,

vs.

BRUCE BABBITT, United States Department of Interior in his capacity as Secretary of Interior, TOM FRY, Director, Bureau of Land Management, and THE BUREAU OF LAND MANAGEMENT,

Defendants,

and

UTAH SHARED ACCESS ALLIANCE, a Utah non-profit corporation, BLUE RIBBON COALITION, an Idaho non-profit corporation, ELITE MOTORCYCLE TOURS, a Utah corporation, and ANTHONY CHATTERLY,

Defendants-Intervenors.

Plaintiffs SOUTHERN UTAH WILDERNESS ALLIANCE, a Utah non-profit corporation, THE WILDERNESS SOCIETY, a national non-profit corporation, THE SIERRA CLUB, a California non-profit corporation, THE GREAT OLD BROADS FOR WILDERNESS, a Utah non-profit corporation, THE WILDLANDS CENTER FOR PREVENTING ROADS, a Montana non-profit corporation, UTAH COUNCIL OF TROUT UNLIMITED, a Utah non-profit corporation, AMERICAN LANDS ALLIANCE, a national non-profit corporation, and the FRIENDS OF THE ABAJOS, a Utah non-profit corporation, as a complaint and cause of action against the defendants BUREAU OF LAND MANAGEMENT ("BLM"), Secretary of Interior BRUCE BABBITT ("the Secretary"), and BLM Acting Director TOM FRY, allege as follows:

INTRODUCTION

1. This suit challenges BLM's failure to control one of the most significant threats to the environmental health of Utah's public lands: unregulated off-road vehicle ("ORV") use. BLM is obligated by Executive Orders and its own regulations to, among other things, minimize the effects of ORVs on public land resources; to designate trails and inform the public where ORVs may and may not travel; and to monitor the impacts of ORV use. BLM has neglected these responsibilities, and as a direct result of that failure, irresponsible ORV use continues to irreparably damage Utah's most spectacular public lands, including designated wilderness study areas and areas that are eligible for wilderness designation in the future.

JURISDICTION AND VENUE

2. This court has jurisdiction over this action pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., the Federal Land Policy

Management Act ("FLPMA"), 43 U.S.C. § 1701 et seq., the Declaratory Judgment Act, 28 U.S.C. § 2201, the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq, and federal question, 28 U.S.C. § 1331.

3. Injunctive relief is authorized by Rule 65 of the Federal Rules of Civil Procedure.

4. Venue is proper in the Central Division of the United States District Court for the District of Utah pursuant to 28 U.S.C. § 1391(e) because the statutory violations alleged herein all occurred within the state of Utah.

PARTIES

5. Plaintiff SOUTHERN UTAH WILDERNESS ALLIANCE ("SUWA") is a non-profit corporation dedicated to the sensible management of all public lands within the State of Utah, to the preservation and protection of plant and animal species, and to the preservation of Utah's remaining wild and undeveloped lands. SUWA has more than 18,000 members, many of whom reside in Utah. SUWA members and staff use and enjoy BLM lands in and throughout Utah for a variety of purposes, including scientific study, recreation, and aesthetic appreciation. Furthermore, SUWA members and staff have a substantial interest in this matter -- they have, and will continue to suffer real and immediate harm as Utah's remaining wild lands are significantly impaired by unrestricted ORV abuse, as alleged below. SUWA is also a charter member of the Utah Wilderness Coalition ("UWC"), a coalition of 160 local and national organizations dedicated to the passage of America's Redrock Wilderness Bill. SUWA brings this action on its own behalf and on behalf of its adversely affected members.

6. Plaintiff THE WILDERNESS SOCIETY ("TWS") is a non-profit national membership organization

founded in 1935 and devoted to preserving wilderness and wildlife on our public lands, and fostering an American land ethic. The Wilderness Society is particularly focused on ensuring that remaining roadless lands are managed to preserve their wild character -- free from roadbuilding, logging, mining, off-road vehicle use, and other development -- and on protecting additional lands as designated wilderness. The Wilderness Society has 188,000 members nationwide, approximately 1,224 of whom reside in Utah. Nationally, many of TWS' members use Utah BLM lands for business and recreation. TWS is also a charter member of the UWC, a coalition of 160 local and national organizations dedicated to the passage of America's Redrock Wilderness Bill. TWS members suffer direct harm by the unregulated use of ORVs in some of Utah's most fragile and stunning lands.

7. Plaintiff THE SIERRA CLUB is a non-profit corporation with its principal place of business in San Francisco, California. The Sierra Club is a national conservation organization with a membership of approximately 560,000. The Utah Chapter is the Utah division of the Sierra Club and has over 6000 members. The Sierra Club's purposes include protecting and enhancing by all lawful means the natural resources and human environment of the United States and the earth, and to explore, enjoy, and preserve those resources. Specifically, the Sierra Club's purposes include advocating responsible management of public lands resources in the state of Utah, and the Utah Chapter has a long history of public education and advocacy to protect such resources. The Sierra Club is also a charter member of the UWC, a coalition of 160 local and national organizations dedicated to the passage of America's Redrock Wilderness Bill. Sierra Club members who use and enjoy the areas described in this complaint as suffering damage from ORVs are directly injured by such damage.

8. Plaintiff THE GREAT OLD BROADS FOR WILDERNESS ("Great Old Broads") is a non-profit corporation with over 1,600 members nation-wide, many of whom reside in Utah. Great Old Broads supports the inclusion of America's threatened wild lands into the National Wilderness Preservation System. In addition, Great Old Broads was formed to protect the interests of senior populations who enjoy access to roadless areas without mechanized means of transportation and its associated impacts on the environment. Many of Great Old Broad's members travel to Southern Utah annually to hike, camp, fish, paint, and photograph. The Great Old Broads is also a member of the UWC, a coalition of 160 local and national organizations dedicated to the passage of America's Redrock Wilderness Bill. Great Old Broad's members suffer actual and immediate harm by rampant and uncontrolled ORV use in some of Utah's most fragile and spectacular lands.

9. Plaintiff WILDLANDS CENTER FOR PREVENTING ROADS ("Wildlands CPR") is a non-profit organization whose mission is to revive and protect the natural, undeveloped character of public lands by promoting appropriate road removal and revegetation, preventing inappropriate and environmentally destructive road construction, and regulating motorized recreation where necessary to protect the environment. Wildlands CPR is a national clearinghouse and network, providing citizens with tools and strategies to promote sensible, but not excessive, transportation routes. Wildlands CPR works with over 450 members nationwide, and has 23 members and affiliated organizations in Utah. Almost half of its Utah members are non-profit organizations, and many of their members visit and recreate throughout Utah BLM lands. Wildlands CPR's members are suffering real and immediate harm as a result of unregulated ORV use and abuse throughout these lands.

10. Plaintiff the UTAH COUNCIL OF TROUT UNLIMITED ("Trout Unlimited") is a non-profit organization whose mission is to preserve, protect, and restore Utah's cold water fisheries and their watersheds. The Utah Council represents eight local Utah Trout Unlimited chapters and has more than 1,200 members, most of whom reside in Utah. Trout Unlimited's members use and enjoy Utah's BLM lands for a variety of purposes, but chiefly to fish and enjoy access to Utah's spectacular trout fishing. Trout Unlimited's members suffer real and actual harm by uncontrolled and irresponsible ORV use in some of Utah's fragile wetland and riparian areas.

11. Plaintiff AMERICAN LANDS ALLIANCE is a national non-profit corporation committed to participating in and educating the public about Utah public lands issues, including ORV use and abuse on BLM lands. American Lands Alliance represents and serves grassroots environmental groups nationwide and reaches more than 2,500 activists, many of whom reside in Utah. American Lands Alliance staff, and members use and enjoy Utah's BLM lands, for a number of purposes, including hiking, birding, fishing, and enjoying peaceful solitude. These people are suffering real and immediate harm from uncontrolled ORV abuses on BLM lands.

12. Plaintiff FRIENDS OF THE ABAJOS is a non-profit organization dedicated to the preservation and restoration of fully functioning natural ecosystems and native species in southeastern Utah's canyon country. Friends of the Abajos has more than twenty members, many of whom reside in Utah. The organization is particularly concerned that the explosion of ORV use in southeastern Utah is greatly impacting the integrity of Utah BLM lands, and it seeks to limit ORV access, funding, and impacts to an amount that equals their percentage of the total public lands user population. Friends of the Abajos members use Utah BLM

lands for hiking, biking, scientific study, birding, and to enjoy peaceful solitude. Its members are suffering a significantly diminished experience on these same lands because of the rapid expansion of user created trails and ORV impacts, including noise, scarring of the landscape, and harassment of wildlife.

13. Defendant BLM is the agency within the U.S. Department of Interior directly responsible for carrying out the Department's obligations under statutes, regulations, and Executive Orders governing ORV use. BLM manages approximately 23 million acres of public lands in Utah.

14. Defendant Bruce Babbitt is the Secretary of the United States Department of Interior, and, among other things is charged with overseeing the management of the nation's BLM lands. The Secretary is further charged with implementing statutes, regulations, and Executive Orders 11644 and 11989 on the lands within his control.

15. Defendant Tom Fry is the acting Director of the Bureau of Land Management, and in that role is charged with the duty of the management of the nation's BLM lands.

BACKGROUND FACTS

A. ORV DAMAGE TO PUBLIC RESOURCES

16. Off-road vehicle or "ORV" is the generic term used to describe motorized vehicles equipped for travel off of improved and maintained roads. Such vehicles include high-clearance jeeps and trucks, cross-country motorcycles, dune buggies, and all-terrain vehicles or "ATVs." When used in areas that cannot sustain their impacts, ORVs cause damage to soils and vegetation; harm to wildlife and wildlife habitat; degradation of both water quality and riparian health; and serious harm to cultural resources. Uncontrolled

ORV use also causes significant conflicts among public land users, as well as the significant impairment of the wilderness qualities of Utah's public lands.

Harm to Soils

17. Fragile soils are damaged by unregulated ORV abuse, and even the single pass of an ORV on sensitive soils, like those found throughout Utah, can cause permanent damage. Soil disruption and soil compaction are among the most readily identified results of ORV travel. Soil disruption includes such things as increased wind and water erosion, decreased soil stability, and destruction of organic crusts. Soil compaction generally refers to increasing soil density and impermeability directly resulting from ORV travel.

18. In some instances ORV use causes the complete removal of soil down to the bedrock layer. Soil erosion is exacerbated when wind or rain strikes a denuded slope, and the soil migrates downslope or is moved large distances by strong winds. In many of Utah's most spectacular lands, including wilderness study areas (WSAs) in the San Rafael Swell evidence of soil erosion is commonplace and widespread. ORV caused soil erosion also degrades water and air quality.

Harm to Vegetation

19. ORVs have significantly impacted Utah's vegetation, in part as a result of the widespread erosion discussed above. These impacts range from the destruction of fragile cryptobiotic crusts, to the wholesale loss of annual and perennial species, as well as damage to mature trees. Ultimately, web-like networks of ORV trails may coalesce into broad areas largely denuded of vegetation. Such impacts are easily seen in place like Behind the Rocks and Sids Mountain wilderness study areas ("WSAs").

20. When taken cross-country or off established routes, ORVs cause significant damage to cryptobiotic crusts which are critical to many plant communities. These crusts are critical to ecosystem health and are largely responsible for maintaining soil stability, retaining critical moisture, reducing wind erosion, and for increasing soil fertility. Studies have documented that even a single pass by an ORV is sufficient to destroy these crusts, and that recurrent ORV travel causes substantial harm. Such harm is evident, among other places, throughout Indian Creek WSA and Utah's fragile Cedar Mesa where denuded landscapes have become a commonplace occurrence.

Harm to Wildlife

21. Numerous studies have documented both direct and indirect ORV caused harm to wildlife. ORV use frequently leads to reduced density and diversity of small mammal populations, through both through direct mortality and loss of critical habitat. For example, cross-country travel crushes the burrows and other shelters that are critical for desert species to seek shelter from daytime heat.

22. Additionally, while on their wintering range, elk and mule deer are particularly susceptible to ORV disturbances. Despite this identified increased risk, current ORV classifications in the places like the Book Cliffs permit unfettered ORV travel through such areas.

Harm to Water Quality

23. ORVs have both direct and indirect negative impacts on Utah's water quality. ORV use in and near stream and riparian systems results in increased turbidity, increased stream temperature, and increased sedimentation. For example, a popular ORV trail in Arch Canyon crosses

Arch Creek over 55 times in seven miles, resulting in increased sedimentation, eroding streambanks, and a reduction in riparian plants.

Harm to Cultural Resources

24. Numerous studies have concluded that the proximity of archeological sites to motorized vehicle access routes is directly correlated to the level of looting or vandalism these sites receive.

25. In Utah, there have been numerous cases in which ORVs have run over archaeological sites, or enhanced access that has, in turn, led to vandalism. For example, pothunters traveling throughout Cedar Mesa on ORVs have vandalized cultural resources.

Increased User Conflicts

26. ORV use has been shown to displace other non-motorized trail users, and studies have even shown that other mechanized trail users (i.e., mountain bikes) are less likely to visit an area with widespread ORV use.

27. ORV and non-motorized conflicts are widely evident throughout Utah's BLM lands. For example, BLM's Price field office's own documents show that it has received numerous letters from non-motorized visitors to the San Rafael Swell detailing "run-ins" with ORV users. These encounters have ranged from finding recent resource destruction, to disputes with ORV users.

Wilderness Suitability

28. As BLM's own reports show, ORVs have caused, and continue to cause, significant impairment to WSAs, as well as lands recognized by both the BLM and the

Utah Wilderness Coalition as having wilderness characteristics. While BLM's internal guidance permits ORVs to travel pre-existing routes within WSAs, ORV users do not remain on these trails but instead frequently travel cross-country and create additional new routes causing damage similar to that described above.

29. For example, ORVs legally access WSAs such as Parunuweap, Crack Canyon, Sids Mountain, and San Rafael Reef through "existing" trails, but ORVs then proceed to travel off-route and cause significant harm to wilderness resources, including destruction of cryptobiotic soil, soil erosion, and permanent, lasting scars to the landscape. Thus, these WSAs and numerous others are suffering significant damage from ORVs, in some cases, to such a level that their suitability for wilderness designation is threatened.

30. BLM's original wilderness inventory pursuant to Section 603 of FLPMA was completed in 1980. In 1999, BLM conducted a supplemental wilderness inventory of the public lands it manages in Utah ("the 1999 Inventory"). The 1999 Inventory identified an additional 2.6 million acres of BLM lands with wilderness characteristics. Although they have the scenic and other qualities necessary for wilderness protection, these areas remain largely open to unrestricted ORV travel.

31. Some of the lands within BLM's 1999 Inventory are threatened by sustained ORV damage, to the point that their future designation as congressionally designated wilderness may be jeopardized.

32. Finally, the Utah Wilderness Coalition has identified 3.3 million acres of BLM lands in addition to existing WSAs and those lands identified in BLM's 1999 Inventory as having wilderness characteristics. Some of these lands are primarily located in areas classified as "open"

to unrestricted ORV travel, and their continuing eligibility for wilderness designation is threatened by significant resource degradation from ORV use.

B. LEGAL FRAMEWORK FOR MANAGEMENT OF ORVS ON PUBLIC LANDS

33. In 1972 President Nixon issued Executive Order 11644, which imposed a number of specific and non-discretionary duties on the Secretary to control and minimize the effects of ORV use. These duties include: classifying all BLM lands as either "open," "closed," or "limited" to ORV travel; designating trails for ORV use in limited areas; marking areas and trails and providing the public with maps depicting such classifications and designations; minimizing the effects of ORV use on specifically identified natural resources; and monitoring ORV impacts throughout BLM lands.

34. In 1978, President Carter issued Executive Order 11989, which amended Executive Order 11644, and gave federal agencies additional direction and authority to control ORV use. Executive Order 11989 empowered federal agencies to adopt a "closed, unless signed open" policy, and also to immediately close areas suffering from ORV damage. The Executive Orders were enacted in furtherance of NEPA, and are found in note following 42 U.S.C. § 4321.

35. In 1979, the BLM issued its off-road vehicle regulations, 43 C.F.R. §§ 8340-42. These regulations further implement, and largely restate, the planning, informational, and monitoring requirements of the Executive Orders.

C. UTAH BLM'S FAILURE TO IMPLEMENT THE EXECUTIVE ORDERS AND BLM REGULATIONS

36. The Utah BLM State Office is located in Salt Lake City, Utah, with eleven field offices throughout Utah. These field offices are in: Salt Lake City, Fillmore, Richfield, Vernal, Price, Moab, Monticello, Kanab, St. George, Grand Staircase-Escalante, and Cedar City. Each field office is comprised of former Resource Areas and/or Planning Units, and, with the exception of the St. George field office, each office is guided by Resource Management Plans (RMPs) and Management Framework Plans (MFPs) that reference earlier planning designations.

37. On May 18, 1998, SUWA filed a Freedom of Information Act ("FOIA") request pertaining to ORV use on BLM lands with the Utah BLM State Office. (Attached as Exhibit A). SUWA's comprehensive FOIA request sought information on all aspects of Utah BLM's ORV management, including the agency's compliance with the Executive Orders and BLM's own regulations. After BLM's initial refusal to provide the documents, nearly a year later SUWA received both a complete set of the requested information as well as notices from every Utah field office stating that the particular office had fully complied with SUWA's FOIA request. (Attached as Exhibit B). Field office responses to SUWA's FOIA were compiled in individual offices and then sent to the State Office for distribution to SUWA.

38. All of Utah's BLM lands have been classified in MFPs, RMPs, or plan amendments as either "open," "limited," or "closed" to ORV travel.

39. An "open" designation permits ORVs to travel anywhere within that area, with no restrictions. Every

Utah field office has lands designated as "open" to cross-country ORV travel. For example, the Mountain Valley Planning Unit (Richfield Field Office) and the Pinyon Planning Unit (Cedar City District Office) are in effect entirely open to cross-country ORV travel, with only a handful of unsigned and unidentified limitations or closures.

40. Additionally, all Utah BLM Field Offices have some lands classified as "limited" to ORV travel. Generally, these limitations restrict ORVs to either "existing" or "designated" routes and trails, as well as seasonal wildlife restrictions.

41. Although many "limited" areas restrict ORV use to "existing" routes and trails, there is no way to ascertain the routes to which ORVs are restricted because the Utah field offices failed to inventory the existing trail networks when the various planning documents were created. As a result of that failure, areas classified as "limited" have suffered a broad expansion of the "existing" trail network without the necessary public input required in BLM's regulations. In fact, there is no map indicating the existing trail network in any Utah field office.

42. BLM law enforcement is unable to enforce "limited" classifications without actual "designations" being published in the Federal Register. Absent these designations, a "limited" classification is in practical and legal effect the same as an "open" classification. As a result of this fact, 94% of Utah BLM lands remain, as a practical matter, open for unrestricted ORV use.

43. Although specifically charged to "monitor the effects of the use of [ORVs]," Utah BLM has with limited exceptions not engaged in such monitoring. In particular, with the exception of the Mountain Valley Planning Unit and sporadic, anecdotal monitoring in existing WSAs, the BLM

has no documentation of any monitoring of ORV use or impacts.

44. Because BLM has failed to monitor ORV use, it cannot and does not know, whether the current classifications "minimize" ORV impacts, as directed by the Executive Orders and its own regulations.

45. In each of the land use planning documents in which BLM classified its lands for ORV use, the agency made specific commitments regarding future actions that would be taken to minimize and regulate the impacts of ORV use. These commitments include: the preparation of more detailed ORV management or travel plans, the preparation of maps and other informational materials for distribution to the public, the creation of monitoring plans and protocols for such monitoring, and the marking and signing of designated trails. With respect to each of the land use planning documents, one or more, and sometimes all of these commitments has not been carried out.

46. Of particular importance to plaintiffs, BLM's failure to adequately control ORV use has resulted in actual, documented harm to existing WSAs, as well as areas identified by the Utah Wilderness Coalition and the BLM as having wilderness characteristics. For instance, in Parunuweap and Canaan Mountain WSAs, repeated ORV abuses have left lasting scars that may prevent these units from being congressionally designated Wilderness. In addition, ORV abuses have escalated to the point that lands identified by UWC as having wilderness characteristics have been entirely removed from consideration.

First Cause of Action

Failure to Designate Trails
(Executive Order 11644 §3 and 43 C.F.R. §8342.1)

47. The allegations of paragraphs 1-46 are incorporated herein by reference.

48. Section 3 of Executive Order 11644 provides that the Secretary "shall designate" trails where off-road vehicle use is impermissible, as well as designating trails where such use is allowed. 43 C.F.R. § 8342.1 also provides that BLM shall designate areas and trails where ORV use is permissible and impermissible.

49. Every Utah BLM has failed to comply with the Executive Orders and regulations and designate trails available for ORV use.

50. Utah BLM undertook to comply with these regulations with respect to "limited" areas by committing in land use planning documents to undertake designation of trails on which ORV use would be permitted. Not a single Utah BLM field office has completed its trail designations in areas identified as "limited" in the relevant land use planning document. Accordingly, BLM has violated Executive Order 11644 § 3(a) and 43 C.F.R. § 8342.1, and section 706(1) of the APA, 5 U.S.C. § 706(1).

Second Cause of Action

Failure to Mark Designated Areas and Trails
(Executive Order 11644 §5 and 43 C.F.R. § 8342.2)

51. The allegations contained in Paragraphs 1-50 are incorporated herein by reference.

52. Section 5 of Executive Order 11644 directs the Secretary to "ensure that areas and trails where off-road vehicle use is permitted are well marked and [to] provide for the publication and distribution of information, including

maps, describing such areas and trails and explaining the conditions of vehicle use."

53. 43 C.F.R. § 8342.2(c) requires BLM to mark and take other appropriate measures to identify areas and trails so that the public will be aware of locations and limitations thereto." BLM must prepare "appropriate informational materials, including maps, available for public review." The agency must also publish its trail designations in the Federal Register. See id., see also 43 C.F.R. § 1610.5-1(b).

54. Every Utah BLM field office has failed to accurately mark and sign most of the areas and trails lawfully available for ORV use. In addition, all Utah BLM field offices have failed to prepare maps identifying trails lawfully open for ORV use. Accordingly, BLM has violated Executive Order 11644 § 5 and 43 C.F.R. § 8342.2(c), and section 706(1) of the APA, 5 U.S.C. § 706(1).

Third Cause of Action

Failure to Monitor ORV Impacts
(Executive Order 11644 §8 and 43 C.F.R. § 8342.3)

55. The allegations of paragraphs 1-54 are incorporated herein by reference.

56. Section 8 of Executive Order 11644 directs the Secretary to monitor "the effects of the use of [ORVs]" and to change ORV designations whenever the minimization criteria in Section 3 are not met.

57. 43 C.F.R. §8342.3 specifically charges BLM to monitor the "effects of the use of off-road vehicles." Based upon that information, BLM may amend, revise, revoke, or take other actions to ensure that it is complying

with the Executive Orders and its own regulations. See id.

58. Every Utah BLM field office, with the exception of the Mountain Valley Planning Unit, has failed to monitor ORV impacts on lands outside of WSAs. Accordingly, BLM has violated Executive Order 11644 § 8(a) and 43 C.F.R. § 8342.3, and section 706(1) of the APA, 5 U.S.C. § 706(1).

Fourth Cause of Action

Failure to Ensure Public Participation in Trail Designation (Executive Order 11644 §3 and 43 C.F.R. § 8342.2)

59. The allegations contained in paragraphs 1-58 are incorporated by reference herein.

60. Section 3 of Executive Order 11644 provides that the BLM "shall ensure adequate opportunity for public participation in the . . . designation of areas and trails."

61. 43 C.F.R. § 8342.2(a) states that the "designation [of] trails . . . is accomplished through the resource management planning process described in [43 C.F.R. § 1600]. . . . Prior to making designations . . . the authorized officer shall consult with interested user groups, Federal, State, county and local agencies, local landowners, and other parties in a manner that provides an opportunity for the public to express itself and have its views given consideration."

62. Every Utah BLM field office has permitted the creation of ORV "user trails" -- created solely by the passage of vehicles -- in "limited" and/or "open" areas without seeking public participation or initiating the resource management planning process. For example, in Sids Mountain, Indian Creek, and Deep Creek Mountains WSAs,

the BLM permitted, without seeking public participation, the creation of numerous ORV user trails; trails which have left significant and in some instances irreparable scars on the landscape.

63. Accordingly, BLM has violated Executive Order 11644 §3(b) and 43 C.F.R. § 8342.2(a), and section 706(1) of the APA, 5 U.S.C. § 706(1).

Fifth Cause of Action

BLM Has Failed to Conform Its Actions to Approved Land Use Management Plans (43 C.F.R. § 1610.5)

64. The allegations contained in paragraphs 1-63 are incorporated by reference herein.

65. 43 C.F.R. § 1610.5-3 states that "[a]fter a plan is approved or amended . . . the District and Area Manager shall take appropriate measures . . . to make operations and activities . . . conform to the approved plan or amendment within a reasonable period of time."

66. As set forth above, every Utah BLM field office has land use planning documents whose nondiscretionary future duties and commitments to manage ORVs have not been carried out. These commitments include: the preparation of detailed ORV implementation plans and/or ORV travel plans, the preparation of maps and other informational materials for distribution to the public, the creation of monitoring plans and protocols, and the marking and signing of designated trails. Accordingly, BLM has violated 43 C.F.R. § 1610.5-3 and section 706(1) of the APA, 5 U.S.C. § 706(1).

Sixth Cause of Action

Violation of FLPMA's WSA Non-Impairment Standard (43 U.S.C. § 1782(c))

67. The allegations contained in paragraphs 1-66 are incorporated by reference herein.

68. Section 1782(c) of FLPMA states that BLM shall manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness."

69. BLM has in the past, and continues today to permit ORVs to impair the suitability of existing WSAs from entry into the national wilderness preservation system.

70. For example, WSAs such as Parunuweap, Canaan Mountain, Behind the Rocks, and Sids Mountains all are suffering impairment that may ultimately disqualify them from wilderness designation. Accordingly, BLM has violated 43 C.F.R. § 1782(c) and section 706(1) of the APA, 5 U.S.C. § 706(1).

Seventh Cause of Action

Failure to Produce Supplemental Environmental Impact Statements (42 U.S.C. § 4332 and 40 C.F.R. § 1502.9*)*

71. The allegations contained in paragraphs 1-70 are incorporated herein by reference.

72. NEPA directs federal agencies proposing "major federal actions significantly affecting the quality of the human environment" to prepare an environmental impact statement. See 42 U.S.C. § 4332(2)(c). 40 C.F.R. § 1502.9(c)(i) and (ii) further direct federal agencies to prepare

a supplemental environmental impact statement if "the agency makes substantial changes in the proposed action" or if "there are new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."

73. Every Utah BLM Field Office's land use planning documents, including resource management plans, management framework plans, and plan amendments, fail to accurately analyze the current use of ORVs on BLM lands, and specifically, fail to analyze the environmental impacts of that use, the relationship between the short-term use of the environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources created by ORV use. Accordingly, BLM's failure to prepare supplemental EISs violates 42 U.S.C. 4332, § 40 C.F.R. 1502.9(c)(i) and (ii), and section 706(1) of the APA, 5 U.S.C. § 706(1).

Eighth Cause of Action

Violation of the Administrative Procedure Act (5 U.S.C. § 706(1))

74. The allegations contained in paragraphs 1-73 are incorporated by reference herein.

75. The Secretary and BLM have failed to comply with the duties clearly enumerated in Executive Orders 11644 and 11989, and 43 C.F.R. §§ 1610.5-3 and 8341-8343, as set forth above. Such failure constitutes agency action unlawfully withheld or unreasonably delayed, and thus SUWA is entitled to a finding that the Secretary and BLM has violated the APA, 5 U.S.C. § 706(1).

Ninth Cause of Action

Failure to Prevent ORV Damage and Preserve Full Range of Options (42 U.S.C. § 4332 and 40 C.F.R. § 1506.1)

76. The allegations contained in paragraphs 1-75 are incorporated herein by reference.

77. NEPA directs federal agencies proposing "major federal actions significantly affecting the quality of the human environment" to prepare an environmental impact statement. See 42 U.S.C. § 4332(2)(c). 40 C.F.R. § 1506.1(a) further directs federal agencies preparing an environmental impact statement to take no action concerning the proposal which would "(1) [h]ave an adverse environmental impact; or (2) [l]imit the choice of reasonable alternatives."

78. The BLM is currently considering a proposal to create numerous FLPMA §202 WSAs throughout Utah. See 64 Fed. Reg. 59787-59789 (Nov. 3, 1999) ("Notice of Intent to Modify Scope of Statewide Environmental Impact Statement (EIS) and Multiple-Plan Amendments Considering Establishment of New Wilderness Study Areas (WSAs) on Selected Public Lands in Utah, and Call for Additional Information). Currently, the BLM permits ORVs to travel within these proposed WSA on "existing routes and ways," or, in some instances, cross-country. This ORV travel has resulted in damage which is having adverse environmental impacts and may, if unchecked, limit the opportunity for these lands to be protected as WSAs.

79. Accordingly, the BLM's failure to preserve a full range of options violates 42 U.S.C. § 4332, 40 C.F.R. § 1506.1(a), and section 706(1) of the APA, 5 U.S.C. § 706(1).

Tenth Cause of Action

Violation of FLPMA's
Non-Degradation Standard
(43 U.S.C. § 1732(b))

80. The allegations contained in paragraphs 1-79 are incorporated herein by reference.

81. Section 1732(b) of FLPMA states that BLM shall manage its lands "to prevent undue and unnecessary degradation."

82. BLM has in the past and continues today to permit ORV damage to cause undue and unnecessary degradation to Utah BLM lands. For example, lands proposed for wilderness designation in America's Redrock Wilderness Bill such as Eagle Canyon, Indian Creek, and Cedar Mountains North are suffering ORV caused damage and degradation.

83. Accordingly, BLM has violated 43 C.F.R. § 1732(b) and section 706(1) of the APA, 5 U.S.C. § 706(1).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court enter judgment in its favor and against the Honorable Bruce Babbitt, Acting Director Tom Fry, and the Bureau and Land Management and that the Court:

(1) Declare that defendants have violated Executive Order 11644, as amended by Executive Order 11989, the Federal Land Policy Management Act, the Administrative Procedure Act, and their implementing regulations as set forth above;

(2) Declare that in "limited" areas BLM must designate specific roads and trails available for ORV use, and that such designations must minimize ORV effects;

(3) Declare that the BLM must provide public information in the form of road and trail markings, and travel maps detailing which lands are available for motorized travel;

(4) Declare that BLM must engage in comprehensive and systematic monitoring of ORV use on lands within its control;

(5) Declare that BLM has violated § 603(c) of the Federal Policy Management Act by permitting ORVs to impair the suitability of existing wilderness study areas for entry into the national wilderness preservation system.

(6) Award injunctive relief prohibiting the use of all ORVs on lands currently identified by the BLM as having wilderness characteristics, as well as those lands identified within the America's Redrock Wilderness Bill, H.R. 1732, that are suffering significant ORV caused impairment of their resources, including suitability for entry into the National Wilderness Preservation System.

(7) Declare that BLM has violated 40 C.F.R. § 1506.1 by permitting ORVs to impair the wilderness qualities of lands proposed by the BLM in its ongoing statewide wilderness study area environmental impact studies for FLPMA §202 WSA status.

(8) Declare that BLM has violated 43 C.F.R. §1610.5-3 by failing to conform agency actions with the specific terms and conditions detailed in its various land use management plans to manage ORV use on Utah BLM lands.

(9) Retain jurisdiction of this action to ensure compliance with its decree;

(10) Award plaintiffs' costs incurred in pursuing this action, including attorney's fees, as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and other applicable provisions;

(11) Grant such other and further relief as is proper.

Respectfully submitted this __ day of May, 2000.

_____

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SOUTHERN UTAH WILDERNESS ALLIANCE a Utah non-profit corporation, THE WILDERNESS SOCIETY, a national non-profit corporation, THE SIERRA CLUB, a California non-profit corporation, THE GREAT OLD BROADS FOR WILDERNESS, a Utah non-profit corporation, WILDLANDS CPR, a Montana non-profit corporation, UTAH COUNCIL OF TROUT	*	Case No. 2:99CV 852 K Judge Kimball Magistrate Boyce **THIRD AMENDED COMPLAINT**

UNLIMITED, a Utah non-profit organization, AMERICAN LANDS ALLIANCE, a national non-profit corporation, and THE FRIENDS OF THE ABAJOS, a Utah non-profit corporation,

Plaintiffs,

vs.

BRUCE BABBITT, United States Department of Interior in his capacity as Secretary of Interior, TOM FRY, Director, Bureau of Land Management, and THE BUREAU OF LAND MANAGEMENT,

Defendants,

and

UTAH SHARED ACCESS ALLIANCE, a Utah non-profit corporation, BLUE RIBBON COALITION, an Idaho non-profit corporation, ELITE MOTORCYCLE TOURS, a Utah corporation, and ANTHONY CHATTERLY,

Defendants-Intervenors.

INTRODUCTION

1. This suit challenges the Bureau of Land Management's ("BLM's") failure to control one of the most significant threats to the environmental health of Utah's public lands: unregulated off-road vehicle ("ORV") use. BLM is obligated by Executive Orders, federal laws, and its own regulations to, among other things, prevent the impairment of wilderness study areas ("WSAs"), minimize the effects of ORVs on public land resources, consistently implement the terms and conditions of its land use plans ("LUPs"), and determine whether its LUPs and their accompanying environmental analyses accurately evaluate current levels of ORV use and damage on the public lands. BLM has neglected these responsibilities, and, as a direct result of that failure, irresponsible ORV use continues to irreparably damage Utah's most spectacular public lands, including WSAs.

JURISDICTION AND VENUE

2. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question).

3. Venue is proper in the Central Division of the United States District Court for the District of Utah pursuant to 28 U.S.C. § 1391(e) because the statutory violations alleged herein all occurred within the state of Utah.

PARTIES

4. Plaintiff SOUTHERN UTAH WILDERNESS ALLIANCE is a non-profit corporation dedicated to the sensible management of all public lands within the State of Utah, to the preservation and protection of plant and animal species, and to the preservation of Utah's remaining wild and

undeveloped lands. SUWA has more than 15,000 members, many of whom reside in Utah. SUWA members and staff use and enjoy BLM lands throughout Utah for a variety of purposes, including scientific study, recreation, and aesthetic appreciation. Furthermore, SUWA members and staff have a substantial interest in this matter because they have, and will continue to suffer real and immediate harm as Utah's remaining wild lands are damaged by unrestricted ORV abuse, as alleged below. SUWA is also a charter member of the Utah Wilderness Coalition ("UWC"), a coalition of over 200 local and national organizations dedicated to the passage of America's Redrock Wilderness Act. SUWA brings this action on its own behalf and on behalf of its adversely affected members.

5. Plaintiff THE WILDERNESS SOCIETY ("TWS") is a non-profit national membership organization founded in 1935 and devoted to preserving wilderness and wildlife on our public lands, and fostering an American land ethic. The Wilderness Society is particularly focused on ensuring that remaining roadless lands are managed to preserve their wild character -- free from roadbuilding, logging, mining, off-road vehicle use, and other development -- and on protecting additional lands as designated wilderness. The Wilderness Society has over 180,000 members nationwide, approximately 1200 of whom reside in Utah. Nationally, many of TWS' members use Utah BLM lands for business and recreation. TWS is also a charter member of the UWC and dedicated to the passage of America's Redrock Wilderness Act. TWS members suffer direct harm by the unregulated use of ORVs in some of Utah's most fragile and stunning lands.

6. Plaintiff THE SIERRA CLUB is a national conservation organization with a membership of approximately 560,000. The Utah Chapter is the Utah division of the Sierra Club and has over 4000 members. The

Sierra Club's purposes include protecting and enhancing by all lawful means the natural resources and human environment of the United States and the earth, and to explore, enjoy, and preserve those resources. Specifically, the Sierra Club's purposes include advocating responsible management of public lands resources in the state of Utah, and the Utah Chapter has a long history of public education and advocacy to protect such resources. The Sierra Club is also a charter member of the UWC and dedicated to the passage of America's Redrock Wilderness Act. Sierra Club members who use and enjoy the areas described in this complaint as suffering damage from ORVs are directly injured by such damage.

7. Plaintiff THE GREAT OLD BROADS FOR WILDERNESS ("Great Old Broads") is a non-profit corporation with over 1,600 members nation-wide, many of whom reside in Utah. Great Old Broads supports the inclusion of America's threatened wild lands into the National Wilderness Preservation System. In addition, Great Old Broads was formed to protect the interests of senior populations who enjoy access to roadless areas without mechanized means of transportation and its associated impacts on the environment. Many of Great Old Broad's members travel to southern Utah annually to hike, camp, fish, paint, and photograph. The Great Old Broads is also a member of the UWC and dedicated to the passage of America's Redrock Wilderness Act. Great Old Broad's members suffer actual and immediate harm by rampant and uncontrolled ORV use in some of Utah's most fragile and spectacular lands.

8. Plaintiff WILDLANDS CENTER FOR PREVENTING ROADS ("Wildlands CPR") is a non-profit organization whose mission is to revive and protect the natural, undeveloped character of public lands by promoting appropriate road removal and revegetation, preventing

inappropriate and environmentally destructive road construction, and regulating motorized recreation where necessary to protect the environment. Wildlands CPR is a national clearinghouse and network, providing citizens with tools and strategies to promote sensible, but not excessive, transportation routes. Wildlands CPR works with over 450 members nationwide, and has several members and affiliated organizations in Utah. Almost half of its Utah members are non-profit organizations, and many of their members visit and recreate throughout Utah BLM lands. Wildlands CPR's members are suffering real and immediate harm as a result of unregulated ORV use and abuse throughout these lands.

9. Plaintiff the UTAH COUNCIL OF TROUT UNLIMITED ("Trout Unlimited") is a non-profit organization whose mission is to preserve, protect, and restore Utah's cold water fisheries and their watersheds. The Utah Council represents eight local Utah Trout Unlimited chapters and has more than 1,200 members, most of whom reside in Utah. Trout Unlimited's members use and enjoy Utah's BLM lands for a variety of purposes, but chiefly to fish and enjoy access to Utah's spectacular trout fishing. Trout Unlimited's members suffer real and actual harm by uncontrolled and irresponsible ORV use in some of Utah's fragile wetland and riparian areas.

10. Plaintiff AMERICAN LANDS ALLIANCE is a non-profit organization committed to participating in and educating the public about Utah public lands issues, including ORV use and abuse on BLM lands. American Lands Alliance represents and serves grassroots environmental groups nationwide and reaches more than 2,500 activists, many of whom reside in Utah. American Lands Alliance staff and members use and enjoy Utah's BLM lands for a number of purposes, including hiking, birding, fishing, and enjoying peaceful solitude. These people are suffering real and immediate harm from

uncontrolled ORV abuses on BLM lands.

11. Plaintiff REDROCK FORESTS[1] is a non-profit organization dedicated to the preservation and restoration of fully functioning natural ecosystems and native species in southeastern Utah's canyon country. Redrock Forests has more than 250 members, many of whom reside in Utah. The organization is particularly concerned that the explosion of ORV use in southeastern Utah is greatly impacting the integrity of Utah BLM lands, and it seeks to limit ORV access, funding, and impacts to an amount that equals their percentage of the total public lands user population. Redrock Forests members use Utah BLM lands for hiking, biking, scientific study, birding, and to enjoy peaceful solitude. Its members are suffering a significantly diminished experience on these same lands because of the rapid expansion of user created trails and ORV impacts, including noise, scarring of the landscape, and harassment of wildlife.

12. Defendant BLM is the agency within the U.S. Department of the Interior directly responsible for carrying out the Department's obligations under statutes, regulations, and Executive Orders governing ORV use. BLM manages approximately 23 million acres of public lands in Utah.

13. Defendant Gale Norton is the Secretary of the United States Department of the Interior and, among other things, is charged with overseeing the management of the nation's BLM lands. The Secretary is further charged with implementing statutes, regulations, and Executive Orders 11644 and 11989 on the lands within her control. Ms. Norton is sued in her official capacity as Secretary of the Department of the Interior.

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[1] Redrock Forests is the successor organization of "Friends of the Abajos," a named plaintiff in the second amended complaint.

14. Defendant Kathleen Clarke is the Director of the Bureau of Land Management, and in that role is charged with the duty of the management of the nation's BLM lands. Ms. Clarke is sued in her official capacity as Director of the Bureau of Land Management.

BACKGROUND FACTS

A. ORV DAMAGE TO PUBLIC RESOURCES

15. The term ORV is used to describe motorized vehicles equipped for travel off of improved and maintained roads. Such vehicles include high-clearance jeeps and trucks, cross-country motorcycles, dune buggies, and all-terrain vehicles. ORVs cause damage to soils and vegetation; harm to wildlife and wildlife habitat; degradation of both water quality and riparian health; and harm to cultural resources. Uncontrolled ORV use also causes significant conflicts among public land users, as well as the impairment of wilderness study areas.

Harm to Soils

16. Fragile soils are damaged by ORV use. Even the single pass of an ORV on sensitive soils, like those found throughout eastern Utah, can cause permanent damage. Soil disruption and soil compaction are among the most readily identified results of ORV travel. Soil disruption includes such things as increased soil erosion, decreased soil stability, and destruction of organic crusts. Soil compaction generally refers to increasing soil density and impermeability directly resulting from ORV travel. ORV-caused soil erosion also degrades water and air quality.

17. In many of Utah's most spectacular lands, including the lands managed by the BLM's Moab, Monticello, and Price field offices, evidence of ORV caused soil erosion is commonplace and widespread.

Harm to Vegetation

18. ORVs significantly impact vegetation on Utah BLM lands. These impacts range from the destruction of fragile cryptobiotic soils, to the loss of annual and perennial species, as well as damage to mature trees. In many instances, web-like networks of ORV trails form broad areas largely denuded of vegetation.

19. When taken cross-country or off established routes, ORVs cause significant damage to cryptobiotic soil crusts that are critical to many plant communities. These living crusts are critical to ecosystem health and are largely responsible for maintaining soil stability, retaining critical moisture, reducing wind erosion, and for increasing soil fertility.

20. Even a single pass by an ORV is sufficient to destroy these crusts, and recurrent ORV travel causes substantial harm.

Harm to Wildlife

21. ORV use causes direct and indirect harm to wildlife. ORV use often leads to reduced density and diversity of small mammal populations, through both through direct mortality and loss of critical habitat. For example, cross-country travel crushes the burrows and other shelters that are critical for desert species to seek shelter from daytime heat.

22. Additionally, while on their wintering range, elk and mule deer are particularly susceptible to ORV disturbances.

Harm to Water Quality

23. ORVs have both direct and indirect negative impacts on Utah's water quality.

24. ORV use in and near stream and riparian systems results in increased turbidity, increased stream temperature, and increased sedimentation.

Harm to Cultural Resources

25. The proximity of archeological sites to motorized vehicle access routes is directly correlated to the level of looting and/or vandalism these sites receive.

26. Utah BLM knows of numerous cases in which ORVs have run over archaeological sites, or enhanced access that has, in turn, led to vandalism.

Increased User Conflicts

27. ORV use displaces non-motorized trail users and studies have shown that other mechanized trail users (i.e., mountain bikes) are less likely to visit an area with widespread ORV use.

28. ORV and non-motorized conflicts occur throughout Utah's BLM lands. For example, BLM's Price field office and Henry Mountains Field Station have received numerous letters from non-motorized visitors to the San Rafael Swell and Factory Butte area detailing altercations with ORV users or concerns about ORV damage.

Wilderness Suitability

29. ORVs have caused, and continue to cause, significant impairment to WSAs.

30. While BLM's internal guidance permits ORVs to travel pre-existing routes within WSAs, many ORV users do not remain on these trails but instead travel cross-country and create additional new routes causing damage similar to that described above.

31. For example, ORVs legally access WSAs such as Parunuweap and Sids Mountain through "existing" trails, but then proceed to travel off-route and cause impairment to wilderness resources.

B. LEGAL FRAMEWORK FOR MANAGEMENT OF ORVS ON PUBLIC LAND

32. In 1972, President Nixon issued Executive Order 11644, entitled "Use of Off-Road Vehicles on the Public Lands." That Executive Order imposed a number of specific and non-discretionary duties on the Secretary to control and minimize the effects of ORV use. These duties include: classifying all BLM lands as either "open," "closed," or "limited" to ORV travel; designating trails for ORV use in limited areas; marking areas and trails and providing the public with maps depicting such classifications and designations; minimizing the effects of ORV use on specifically identified natural resources; and monitoring ORV impacts throughout BLM lands.

33. In 1978, President Carter issued Executive Order 11989, which amended Executive Order 11644 (collectively "the Executive Orders"), and gave federal agencies additional direction and authority to control ORV use. Executive Order 11989 empowered federal agencies to

adopt a "closed, unless signed open" policy, and also to immediately close areas suffering from ORV damage.

34. The Executive Orders were enacted in furtherance of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., and are found in note following 42 U.S.C. § 4321.

35. In 1979, the BLM issued its off-road vehicle regulations, 43 C.F.R. §§ 8340-42. These regulations further implement, and largely restate, the planning, informational, and monitoring requirements of the Executive Orders.

C. UTAH BLM'S FAILURE TO IMPLEMENT THE EXECUTIVE ORDERS, FEDERAL LAWS, AND AGENCY REGULATIONS

36. The Utah BLM State Office is located in Salt Lake City, Utah, with eleven field offices throughout Utah. These field offices are in Salt Lake City, Fillmore, Richfield, Vernal, Price, Moab, Monticello, Kanab, St. George, Grand Staircase-Escalante, and Cedar City. Each field office is guided by Resource Management Plans (RMPs) and/or Management Framework Plans (MFPs) prepared pursuant to the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 et seq.

37. All of Utah's BLM lands have been classified in MFPs, RMPs, or subsequent plan amendments as either "open," "limited," or "closed" to ORV travel.

38. An "open" designation permits ORVs to travel anywhere within that area, with no restrictions. Every Utah field office has lands designated as "open" to cross-country ORV travel, though many of these designations were made decades ago when ORV use was low throughout Utah.

39. Additionally, all Utah BLM Field Offices have some lands classified as "limited" to ORV travel. Generally, these limitations restrict ORVs to either "existing" or "designated" routes and trails, as well as seasonal wildlife restrictions.

40. Although many "limited" areas restrict ORV use to "existing" routes and trails, BLM does not know the routes to which ORVs are restricted because all Utah field offices failed to inventory the existing trail networks when the various planning documents were created. As a result of that failure, BLM offices such as the Monticello field office and Henry Mountains field station that have lands classified as "limited to existing routes and trails" have seen a broad expansion of the "existing" trail network.

41. No Utah BLM field office has a map or information indicating the existing trail network at the time its respective land use plan was finalized.

42. BLM law enforcement is unable to enforce ORV "limited" classifications without actual trail "designations" being published in the Federal Register. Absent these designations, a "limited" classification is in practical and legal effect the same as an "open" classification.

43. In each of the land use planning documents in which BLM classified its lands for ORV use, the agency made specific commitments regarding future actions that would be taken to minimize and regulate the impacts of ORV use. These commitments include: the preparation of more detailed ORV management or travel plans, the preparation of maps and other informational materials for

distribution to the public, the creation of monitoring plans and protocols for such monitoring, and the marking and signing of designated trails. Many of these commitments have not been carried out.

44. BLM has not prepared and implemented an ORV implementation plan for the San Juan resource area, as required by the 1991 San Juan RMP.

45. BLM does not have a formalized monitoring plan to monitor ORV use in the San Juan resource area, as required by the 1991 San Juan RMP.

46. BLM has not prepared or implemented ORV trail designations through an activity level plan as required by the 1999 St. George RMP.

47. BLM's 2000 Monument Management Plan restricted ORVs to designated trails within the Grand Staircase-Escalante National Monument ("GSENM") or closed areas to ORVs altogether. BLM has not completed on-the-ground signing and other steps necessary to implement the GSENM 2000 management plan.

48. BLM has not prepared or established ORV designations as required by the 1990 Price River ORV Implementation Plan.

49. BLM has not distributed an ORV designation brochure as required by the 1990 Price River ORV Implementation Plan.

50. BLM has not prepared an area-wide ORV plan for the Diamond Mtn. planning area, as required by the 1991 Diamond Mountain RMP.

51. BLM has not prepared or implemented an ORV monitoring system in the Book Cliffs planning area, as required by the 1985 Book Cliffs RMP.

First Cause of Action

Failure to Designate Trails
(Executive Order 11644 §3 and 43 C.F.R. §8342.1)

52. The allegations of paragraphs 1-51 are incorporated herein by reference.

53. Section 3 of Executive Order 11644 provides that the Secretary "shall designate" trails where off-road vehicle use is impermissible, as well as designating trails where such use is allowed. 43 C.F.R. § 8342.1 also provides that BLM shall designate areas and trails where ORV use is permissible and impermissible.

54. With the exception of the 2003 Price field office San Rafael Swell Route Designation Plan, every Utah BLM field office has failed to comply with the Executive Orders and regulations and designate trails available for ORV use.

55. Accordingly, BLM's failure to comply with Executive Order 11644 § 3(a) and 43 C.F.R. § 8342.1 is arbitrary, capricious, and otherwise not in accordance with law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.

Second Cause of Action

Failure to Mark Designated Areas and Trails
(Executive Order 11644 §5 and 43 C.F.R. § 8342.2)

56. The allegations contained in Paragraphs 1-51 are incorporated herein by reference.

57. Section 5 of Executive Order 11644 directs the Secretary to "ensure that areas and trails where off-road vehicle use is permitted are well marked and [to] provide for the publication and distribution of information, including maps, describing such areas and trails and explaining the conditions of vehicle use."

58. 43 C.F.R. § 8342.2(c) requires BLM to mark and take other appropriate measures to identify areas and trails so that the public will be aware of locations and limitations thereto." BLM must prepare "appropriate informational materials, including maps, available for public review." The agency must also publish its trail designations in the Federal Register. See id. See also 43 C.F.R. § 1610.5-1(b).

59. Every Utah BLM field office has failed to accurately mark and sign most of the areas and trails lawfully available for ORV use. In addition, all Utah BLM field offices have failed to prepare maps identifying trails lawfully open for ORV use.

60. Accordingly, BLM's failure to comply with Executive Order 11644 § 5 and 43 C.F.R. § 8342.2(c) is arbitrary, capricious, and otherwise not in accordance with law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.

Third Cause of Action

BLM Has Failed to Conform Its Actions to ApprovedLand Use Management Plans (43 U.S.C. § 1732(a) and 43 C.F.R. § 1610.5)

61. The allegations contained in paragraphs 1-51 are incorporated by reference herein.

62. FLPMA requires the Department of the Interior and BLM to "manage the public lands ... in accordance with the land use plans [LUPs] developed ... under section 1712 [of FLPMA]." 43 C.F.R. § 1732(a).

63. 43 C.F.R. § 1610.5-3 states that "[a]fter a plan is approved or amended . . . the District and Area Manager shall take appropriate measures . . . to make operations and activities . . . conform to the approved plan or amendment within a reasonable period of time."

64. BLM has failed to consistently implement the terms and provisions of its various land use plans, as set forth above.

65. Accordingly, BLM's failure to comply with 43 U.S.C. § 1732(a) and 43 C.F.R. § 1610.5-3 is arbitrary, capricious, and otherwise not in accordance with law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.

Fourth Cause of Action

Violation of FLPMA's WSA Non-Impairment Standard (43 U.S.C. § 1782(c))

66. The allegations contained in paragraphs 1-51 are incorporated by reference herein.

67. Section 1782(c) of FLPMA states that BLM shall manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness."

68. BLM has in the past, and continues today to permit ORVs to impair the suitability of WSAs from entry into the national wilderness preservation system.

69. BLM has failed to prevent ORV impairment of the following WSAs: Parunuweap, Canaan Mountain, Moquith Mountain, and Sids Mountains. Accordingly, BLM's failure to comply with 43 C.F.R. § 1782(c) is arbitrary, capricious, and otherwise not in accordance with law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.

Fifth Cause of Action

Failure to Produce Supplemental Environmental Impact Statements
(42 U.S.C. § 4332 and 40 C.F.R. § 1502.9)

70. The allegations contained in paragraphs 1-51 are incorporated herein by reference.

71. NEPA directs federal agencies proposing "major federal actions significantly affecting the quality of the human environment" to prepare an environmental impact statement. See 42 U.S.C. § 4332(2)(c).

72. 40 C.F.R. § 1502.9(c)(i) and (ii) further direct federal agencies to take a hard look and determine if "there are new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts," and if so to prepare a supplemental NEPA document. In addition, NEPA's regulations require federal agencies to prepare a supplemental environmental impact statement if "the agency makes substantial changes in the proposed action."

73. Every Utah BLM Field Office has failed to take a hard look at whether its land use planning documents, including resource management plans, management framework plans, plan amendments, and activity level plans, accurately analyze current ORV use and damage on Utah BLM lands, and where necessary prepare supplemental NEPA documents to address these changes.

74. Accordingly, BLM's failure comply with 42 U.S.C. 4332 and § 40 C.F.R. 1502.9(c)(i) and (ii), is arbitrary, capricious, and otherwise not in accordance with law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court enter judgment in its favor and against the Honorable Gale Norton, Director Kathleen Clarke, and the Bureau and Land Management and that the Court:

(1) Declare that defendants have violated Executive Order 11644, as amended by Executive Order 11989, the Federal Land Policy and Management Act, the National Environmental Policy Act, their implementing regulations as set forth above;

(2) Declare that BLM has violated Executive Order 11644 § 3 and 43 C.F.R. § 8342 by failing to designate specific roads and trails available for ORV use in "limited areas";

(3) Declare that BLM has violated Executive Order 11644 § 5 and 43 C.F.R. § 8342 by failing to provide public information in the form of road and trail markings,

and travel maps detailing which lands are available for motorized travel;

(4) Declare that BLM has violated § 603(c) of the Federal Land Policy and Management Act by permitting ORVs to impair the suitability of wilderness study areas for entry into the national wilderness preservation system;

(5) Declare that BLM has violated 43 C.F.R. §1610.5-3 by failing to conform agency actions with the specific terms and conditions detailed in its various land use management plans to manage ORV use on Utah BLM lands;

(6) Declare that BLM has violated NEPA implementing regulation 40 C.F.R. § 1502.9 by failing to take a hard look at whether current levels of ORV use and damage exceed those analyzed in existing land use plans and their respective NEPA analyses;

(7) Declare that BLM has violated NEPA by failing to prepare supplemental NEPA analyses to consider, evaluate, and disclose the current levels of ORV use and damage;

(8) Retain jurisdiction of this action to ensure compliance with its decree;

(9) Award plaintiffs' costs incurred in pursuing this action, including attorney's fees, as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and other applicable provisions; and

(10) Any injunctive relief requested by SUWA will not illegally infringe upon perfected R.S. 2477 rights-of-way that meet the standard set out by this Court in Southern Utah Wilderness Alliance v. BLM, 147 F. Supp.2d 1130 (D. Utah 2001), or that federal courts have recognized pursuant

to the Quiet Title Act. In addition, any injunctive relief requested will not seek to restrict access to Utah School and Institutional Trust Lands in contravention of the standards recognized in State of Utah v. Andrus, 486 F. Supp. (D. Utah 1979).

Respectfully submitted this 23rd day of July, 2003.

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Attorneys for Plaintiffs
Southern Utah Wilderness Alliance et al

IN THE UNITED STATES
DISTRICT COURT FOR
THE DISTRICT OF UTAH

CENTRAL DIVISION

SOUTHERN UTAH
WILDERNESS
ALLIANCE et al.,

Plaintiffs, ORDER

vs. Case No. 2:99CV852K

BRUCE BABBITT et al.,

Defendants,

and

UTAH SHARED ACCESS
ALLIANCE et al.,

Defendant-Intervenors,

and

SAN JUAN COUNTY, UTAH et al.,

Defendant-Intervenors.

After a six-day evidentiary hearing on Plaintiffs' motions for a temporary restraining order and for a preliminary injunction, and after a subsequent hearing on Defendant-Intervenors Utah Shared Access Alliance et al.'s Motion to Dismiss, which pertained to the claims that were the subject of the preliminary injunction hearing, this court, on December 22, 2000, issued a Memorandum Decision and Order (the December 22 Order"). The December 22 Order, among other things, dismissed with prejudice Plaintiffs' First, Fifth, Six, and Seventh Claims for Relief to the extent they pertain to the wilderness study areas ("WSAs") and the § 202 Areas addressed during the preliminary injunction hearing. Consequently, the court also denied as moot Plaintiffs' Motion for a Preliminary Injunction.

The court finds that there is no just reason for delay and expressly directs the entry of judgmdent on these claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure ("Rule 54(b)").

Accordingly, for good cause appearing, IT IS HEREBY ORDERED that the Clerk of the Court is directed, pursuant to Rule 54(b), to enter judgment in favor of Defendants and Defendant-Intervenors on Plaintiffs' First, Fifth, Six, and Seventh Claims for Relief, to the extent these claims pertain to the WSAs and § 202 Areas addressed during the preliminary injunction hearing.

DATED this 9th day of February, 2001.

BY THE COURT:

DALE A. KIMBALL
United States District Judge

HAND DELIVERED

September 14, 1999

Tom Fry
Deputy Director - Bureau of Land Management
1849 C. Street NW
Washington. D.C. 20240

Dear Directory Fry:

The Southern Utah Wilderness Alliance is pleased to welcome you to Utah for State Director Wisely's swearing in ceremony. We are looking forward to working with Director Wisely on a range of issues, including the § 202 wilderness inventory EIS and off-road vehicle management.

As you may know, ORV use and abuse is a pressing issue in Utah, and SUWA is gravely concerned that their serious, and indeed permanent impacts, are destroying Utah BLM lands. To that effect, I have included a handful of photographs taken over the Labor Day weekend near Factory Butte, an internationally recognized landmark, and an area recognized by BLM in 1999 as having wilderness characteristics. I have also attached a copy of the 1988 Henry Mountain Resource Area Off-Road Vehicle Implementation Plan, which specifically identifies the area around Factory Butte as a "special monitoring area," citing concerns of ORV caused damage.

BLM has never conducted this monitoring, and, as the photos enclosed illustrate, unrestricted ORV use is having dramatic impacts. Without such a monitoring

program, BLM has no concept whether ORV impacts are being "minimized" as mandated by Presidential Executive Order and BLM's own regulations.

This is only one example of an ORV problem plaguing Utah BLM statewide. We hope BLM recognizes the severity of this problem, and look forward to it taking the long-overdue steps necessary to curb ORV abuse.

Sincerely,

Stephen Bloch
Staff Attorney

Attachments

October 4, 1999

Dick Manus
Bureau of Land Management - Price Field Office
125 South 600 West
P.O. Box 7004
Price, Utah 84501

Dear Dick:

I wanted to thank you for taking the time to briefly meet with me and talk about the continuing off-road vehicle ("ORV") problem in the San Rafael Swell. SUWA is gravely concerned that abusive ORV use and subsequent impacts are destroying the wilderness qualities of wilderness study areas (WSAs) within the Swell. As I stated, it is firmly SUWA's position, and indeed the BLM's own regulations mandate, that WSAs must be closed to ORV use when they are suffering "impairment." As you well know, 43 C.F.R. § 8341.2 directs BLM managers to immediately close areas suffering "considerable adverse effects" from ORV use and abuse. That section further provides that areas must remain closed until "the adverse effects have been eliminated and measures implemented to prevent recurrence."

In Information Bulletin 99-181, issued on July 13, 1999, from Acting Director Tom Fry to all field officials, the BLM's clear position of not permitting WSA impairment was reiterated. (See attached and excerpted below)

> "It is the BLM's policy that cross-country vehicle use in the WSAs does cause the impairment if wilderness suitability. The BLM policy establishing what is necessary to prevent such impairment is set forth in BLM Manual Handbook H-8550-1, Interim

> Management Policy and Guidelines for Lands Under Wilderness Review. In chapter 1, Paragraph 2.B.a., nonimpairing use is "... a temporary use that does not create surface disturbance ..." Uses that cause surface disturbance are, therefore, impairing uses. In this same chapter in Paragraph 3, under the heading Surface Disturbance, it states "Cross-country vehicle use off boundary roads and existing ways is surface disturbance because the tracks created by the vehicles leave depressions or ruts, compact the soils and trample or compress vegetation."

(Emphasis added).

As you acknowledged on Friday, your staff has prepared a report and summary of WSA impairments throughout the San Rafael Swell; a report that documents rampant ORV abuse and impairment. Because this report documents existing and ongoing impairment, it is incumbent upon you to immediately close the areas identified as suffering such abuse until such time that these threats are eliminated. SUWA strongly disagrees that there are any extraneous factors that would militate against immediately closing areas with identified resource abuses. Furthermore, any resource impairment rises to a level that demands such closure; there simply is no grey areas where impairment does not demand firm and immediate action. To this end, I have enclosed reprinted photographs of ORV caused impairment in Sid's Mountain WSA, taken the week of September 20, for your review and consideration. As these pictures illustrate, and as is true throughout the Swell, ORVs are leaving identified "ways" and causing widespread, permanent resource impairment. Indeed, ORVs do not remain on identified travel routes, but instead drive cross-country across some of Utah's most scenic and fragile lands.

I know ORV abuse is a high priority for your Field Office and expect that you will review BLM's own regulations and guidelines and quickly take the necessary steps to protect these resources; resources that we can all agree demand our utmost energy to preserve and protect for future generations. I look forward to hearing from you how the Price office will be addressing these concerns.

Sincerely,

Stephen Bloch
Staff Attorney

cc: Sally Wisely, State Director
Tom Fry, Acting Director

August 19, 1999

Sally Wisely -State Director
Bureau of Land Management
324 S. State St. Suite 301
P.O. Box 45155
Salt Lake City, Utah 84145-0155

Dear Sally,

I wanted to thank you again for taking the time to sit down with Heidi and I last month. It was good to meet, and we're both looking forward to working with you in the future. Following up on our discussion of off-road vehicles impairing wilderness suitability in existing WSAs, I wanted to share these photos taken in May and August of Canaan Mtn. and Parunuweap WSAs. Photos number 1-3 are all taken from the border of Canaan Mtn. WSA, in an area that is only accessible by the Elephant Butte/Goat Springs Road, which provides ORVs access to both WSAs (see the accompanying 7.5 minute map - this area is circled in orange). As you can plainly tell, these pictures show a BLM constructed barrier, that was intended to prevent ORV access to Broad Hollow (Canaan Mtn. WSA), completely dislodged and destroyed. I have also included a letter from BLM wilderness ranger Mike Salamacha from March 1999, describing both the barrier and the destruction he has witnessed over the years to this area.

Additionally, photos number 4-5 are taken many miles inside the Parunuweap WSA. Notably, these pictures are not taken from an existing road, as you might expect from the apparent high use, but rather on an entirely illegal user trail. (See the accompanying 1:100,000 map - this area is circled in orange). ORV users drive the Poverty Flat Road, which is senselessly cherry-stemmed many miles inside the WSA and creates an indefensible boundary for

BLM, and simply continue on a now well-traveled route. The St. George and Kanab offices are well aware of this route, but because this area is between three BLM office jurisdictions (Cedar City, St. George, and Kanab), BLM has been either unwilling or unable to protect this spectacular resource. Further, about a mile up the "road" from the end of the cherry stem, a natural ledge presents an excellent opportunity for BLM to place a barrier and prevent further ORV abuse. These two examples are representative of statewide ORV caused wilderness impairments occurring right now.

Not to dwell entirely on the negative, we are encouraged by the Cedar City Office's proposed placement of rock barriers in Spring Creek Canyon WSA to prevent further ORV abuse. This is precisely the step BLM needs to take on a statewide basis -- a step that is both long overdue and sorely needed. Of course, vigilant enforcement of this closure is absolutely necessary to its effectiveness, and we have every confidence that law enforcement will take whatever steps necessary to ensure this happens.

Finally, as noted in BLM Information Bulletin 99-181 (July 13, 1999), "cross-country vehicle use in the WSAs does cause the impairment of wilderness suitability . . . [such use] is disturbing because the tracks created by the vehicle leave depressions or ruts, compact the soil and trample vegetation." Though current BLM IMP for Lands Under Wilderness Review does allow vehicle travel in WSAs on existing routes, such travel is only permissible if it does not cause impairment of the wilderness resource. It is simply fictitious for BLM to believe that such impairment is not occurring on and off the numerous "existing" routes within WSAs. Indeed, off-route travel is frequently the rule, and not the exception in Utah WSAs.

I would be happy to speak further with you about this and other ORV issues after you have had a chance to review the photos and perhaps to speak with Field Office managers and staff. Thank you again for your time.

Sincerely,

Stephen Bloch
Staff Attorney

cc: Keith Aller, Special Agent in Charge

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SOUTHERN UTAH WILDERNESS ALLIANCE, a Utah non-profit corporation, et al.,

Plaintiffs,

vs.

BRUCE BABBITT, United States Department of Interior in his capacity as Secretary of Interior, et al.,

Defendants,

and

UTAH SHARED ACCESS ALLIANCE, a Utah non-profit Corporation, et al.,

Defendants-Intervenors

DEFENDANTS' RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSIONS

Case No. 2:99CV852K

Request for Admission 35: Impairment has been, and continues to be caused by ORVs within Utah BLM managed wilderness study areas.

Response: The defendants admit that impairment has been caused by ORVs within some Utah wilderness study areas but deny that impairment has been caused in all Utah wilderness study areas. Specifically, there is no known impairment of the Wah Wah WSA, the La Verkin Creek Canyon, the Watchman, Taylor Creek, Goose Creek, Bear Trap, the Joshua Tree Instant Study Area, the Dirty Devil WSA, most of the Mount Ellen-Blue Hills WSA, a portion of the Mount Hilliers WSA, most of the Little Rockies WSA, the Bridger Jack WSA, the Mancos Mesa, and the Daniels Canyon WSA.